Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

AKHTAR ZAMAN (TAHIRKHAILI),

Petitioner,

v.

THE STATE OF ARIZONA,

Respondent.

On Petition For Writ Of Certiorari To The Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. As a matter of federal Indian law, does the state court of Arizona have subject matter jurisdiction over a paternity action that arose from the Navajo Indian Reservation, involving a Navajo mother and child, and a Navajo Nation employee and permanent resident?

2. Does the "*Montana* presumption" against tribal civil jurisdiction over non-Indians, which was recently applied by this Court in *Strate v. A-1 Contractors*, apply to a case arising from reservation land, as opposed to "alienated non-Indian land [*Montana*] or a state "right-of-way" [*Strate*]? Is *Montana* the "pathmarking" case for civil cases arising from reservation land which is not the "equivalent" of "alienated non-Indian" land?

3. Did the Arizona Supreme Court grossly misconstrue federal Indian law by finding that the "infringement test" of *Williams v. Lee* was inapplicable to a paternity proceeding arising from the Navajo Nation simply because the defendant was a non-Indian?

4. May the Navajo Nation courts exercise jurisdiction over a paternity case when the Navajo mother and non-Indian father lived and worked for the Tribe on the reservation, the child was conceived on the Navajo reservation, and both parents and the child continued to live on the reservation when the child was born and the lawsuit was filed?

QUESTIONS PRESENTED – Continued

5. Is there a split between the decisions of the Arizona Supreme Court, the Supreme Court of the Navajo Nation, and the highest courts of several states regarding jurisdiction over domestic relations cases arising on tribal land?

6. Does dictum in *Three Affiliated Tribes v. Wold Engineering* allow any suit in state court by an Indian against a non-Indian regardless of where the case arose?

PARTIES TO THE PROCEEDING

All of the parties to this proceeding are listed in the caption of the case.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING iii

TABLE OF AUTHORITIES vi

I. PRELIMINARY MATTERS 1

A. Opinions Below 1

B. Jurisdiction 1

C. Constitutional and Statutory Provisions ... 1

II. STATEMENT OF THE CASE AND SUMMARY OF PROCEEDINGS BELOW 2

A. Brief Statement of Facts 2

B. The Proceedings Below Focused on Important Questions of Federal Indian Law 3

III. REASONS FOR GRANTING THE PETITION .. 9

A. The *Zaman* Decision by the Arizona Supreme Court Decided an Important Federal Question in a Way That Conflicts With Relevant Decisions of This Court 9

1. The Arizona Supreme Court Not Only Rendered a Decision that is Inconsistent With Leading Precedent From This Court, But It Totally Misapplied and Contradicted Fundamental Supreme Court Precedent in the Field of Federal Indian Law 9

TABLE OF CONTENTS – Continued

Page

2. The Arizona Supreme Court Contradicted Leading Supreme Court Precedent in the Field of Federal Indian Law by Failing to Apply the "Infringement Test" of *Williams v. Lee* and by Failing to Consider or Weigh Important Tribal Interests 12

B. A State Court of Last Resort Has Decided an Important Federal Question in a Way That Conflicts With the Decision of Another State Court of Last Resort or of the United States Court of Appeals or of an Indian Nation of Last Resort 19

1. The Decision of the Arizona Supreme Court is Directly Contradicted by the Supreme Court of the Navajo Nation, the Arizona Court of Appeals, and the Navajo District Court. A Standoff Has Resulted 19

C. A State Court of Last Resort Decided an Important Question of Federal Indian Law That Has Not, But Should Be, Settled by This Court 24

IV. CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Begay v. Roberts, 167 Ariz. 375, 807 P.2d 1111 (App., Div. One, 1990) 16, 17

Billie v. Abbott, 6 Nav. R. 146, 16 Ind. L. Rptr. 6021 (Navajo 1988) 22, 26

Brendale v. Confederated Tribes, 492 U.S. 408 (1989) ... 15, 16

Byzewski v. Byzewski, 429 N.W. 394 (N.D. 1988) 16

Cohen v. Little Six, Inc., 543 N.W.2d 376 (Minn. App. 1996) 17

Dixon v. Picopa Construction Co., 160 Ariz. 251, 772 P.2d 1104 (1989) 16

Duro v. Reina, 495 U.S. 676 (1990) 29

Felix v. Patrick, 145 U.S. 317 (1892) 24

Fellows v. Blacksmith, 19 How. 366, 16 L.Ed 684 (1857) 24

Fisher v. District Court, 424 U.S. 382 (1976) 14, 25

Fletcher v. Peck, 6 Branch 87, 147 3.L.Ed 162 (1810) 7

Hinshaw v. Mahler, 42 F.3d 1178 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 485 (1994) 17

In re Marriage of Limpy, 636 P.2d 266 (Mont. 1981) 18

In re the Matter of A.O., a Minor, 5 Nav. R. 285 (1987) 18

Iowa ex rel. Vega v. Medina, 549 N.W.2d 507 (Iowa 1996) 17

Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987) 16, 27, 28

TABLE OF AUTHORITIES – Continued

Page

Jackson County Child Support Enforcement Agency v. Swayney, 352 S.E.2d 413 (N.C. 1987) 23

Martinez v. Superior Court of La Paz County, 152 Ariz. 300, 731 P.2d 1244 (Ariz. App. 1987) 16, 17

McClanahan v. Arizona State Tax Comm'n, 411 U.S. 172 (1973) 7, 17, 24

Milbank Mutual Ins. Co. v. Eagleman, 705 P.2d 1117 (Mont. 1985) 17

Montana v. United States, 450 U.S. 544 (1981) .... *passim*

Morris v. Hitchcock, 194 U.S. 384 (1904) 16

National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985) 28

Navajo Nation v. McDonald, 180 Ariz. 539, 885 P.2d 1104 (App., Div. One, 1994) 17

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) 7

Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968) 24

R. J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985) 15, 17

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 14

Simmons v. Eagle Sealatsee, 244 F.Supp. 808 (D. Oregon 1965), *affirmed*, 384 U.S. 209 (1966) 27

Snooks v. Ninth Judicial District of Nevada, et al., 919 P.2d 1064 (Nev. 1996) 17

TABLE OF AUTHORITIES – Continued

Page

State v. Whitebreast, 409 N.W.2d 460 (Iowa 1987)..... 24

State v. Zaman, 187 Ariz. 81, 927 P.2d 347 (App., Div. One, 1996)..... 1, 13, 20

State v. Zaman, 254 Ariz. Adv. R. 8 (1997) 1, 10, 11, 13, 14

State ex rel. Dept. of Human Services v. Jojola, 660 P.2d 590 (N.M. 1983), *cert. denied*, 464 U.S. 803 (1983) 23, 24

State ex rel. Flammond v. Flammond, 621 P.2d 471 (Mont. 1980).....16, 23

State ex rel. Iron Bear v. District Court, 512 P.2d 1292 (Mont. 1973)..... 17

State ex rel. Stewart v. District Court, 609 P.2d 290 (Mont. 1990)..... 17

State ex rel. Three Irons v. Three Irons, 621 P.2d 476 (Mont. 1980)..... 23

Strate v. A-1 Contractors, 520 U.S. ___, 117 S. Ct. 1404 (1997)..... *passim*

Three Affiliated Tribes v. Wold Engineering (Wold I), 467 U.S. 138 (1984).....7, 17, 25, 26, 30

Three Affiliated Tribes v. Wold Engineering (Wold II), 476 U.S. 877 (1986)..... 6

United States v. Candelaria, 271 U.S. 432 (1926)..... 24

United States v. Kagama, 118 U.S. 375 (1886) 15

United States v. Mazurrie, 419 U.S. 544 (1975)..... 15

TABLE OF AUTHORITIES – Continued

Page

Washington v. Confederated Tribes, 447 U.S. 134 (1980) 16

Wells v. Wells, 451 N.W.2d 2 (S.D. 1990) 16

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 15

Whyte v. District Court of Montezuma County, 346 P.2d 1012 (Col. 1959) 16

Williams v. Lee, 358 U.S. 217 (1959) ..... *passim*

Wilson v. Marchington, et al., 934 F.Supp. 1176 (D. Mont. 1995) 17

Wilson v. Zaman, SC-CV-44-95 (Navajo 1996) ..... *passim*

Worcester v. Georgia, 6 Pet. 515 (1832) 15

STATUTES

Public Law 280, Act of Aug. 15, 1953, ch. 505, 57 Stat. 558, *codified as amended* at Titles 18 U.S.C. § 1162 (1984), 25 U.S.C. §§ 1321-1326 (1983), and 28 U.S.C. § 1360 (1993) 1, 4, 18

Title 18 U.S.C. § 1162 (1984) 1, 4

Title 25 U.S.C. § 1301 (1983) 5

Title 25 U.S.C. § 1324 (1983) 5

Title 25 U.S.C. §§ 1321-1326 (1983) 1, 4, 5

Title 28 U.S.C. § 1257 (1988) 1

Title 28 U.S.C. § 1360 (1993) 1, 4

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

Arizona Constitution, Art. 20, Sec. 4 .....1, 4

PUBLICATIONS, TEXTS, AND PERIODICALS

F. Cohen, *Handbook of Federal Indian Law* (Michie, 1982 ed.) 18, 28

F. Cohen, *Handbook of Federal Indian Law* (Univ. N.M. 1942) 28, 29

I. PRELIMINARY MATTERS.

A. Opinions Below.

The Arizona Supreme Court opinion is published at 254 Ariz. Adv. R. 8 (1997). The decision of the Arizona Court of Appeals, which was reversed by the Arizona Supreme Court, is reported at 187 Ariz. 81, 927 P.2d 347 (App., Div. One, 1996). The Supreme Court of the Navajo Nation issued an opposing decision and order arising from the same dispute, *Wilson v. Zaman,* SC-CV-44-95 (Navajo 1996) [Appx. at pp. 32a-33a].

B. Jurisdiction.

The basis for this Court to exercise jurisdiction and to review the decision of the Arizona Supreme Court is codified in Title 28 U.S.C. § 1257, as revised in the Act of June 27, 1988, 102 Stat. 662. The decision of the Arizona Supreme Court was entered and filed on October 9, 1997. No petition for rehearing was filed.

C. Constitutional and Statutory Provisions.

The constitutional provisions, treaties, statutes, ordinances, and regulations involved in this case are set forth in the Appendix: Public Law 280, Act of Aug. 15, 1953, ch. 505, 57 Stat. 558, *codified as amended* at Titles 18 U.S.C. § 1162 (1984), 25 U.S.C. §§ 1321-1326 (1983), and 28 U.S.C. § 1360 (1993); Arizona Constitution, Art. 20, Sec. 4 (Disclaimer over Indian Land); Navajo Treaty of 1868, Arts. 1-2, 9, 15 Stat. 667.

II. STATEMENT OF THE CASE AND SUMMARY OF PROCEEDINGS BELOW.

A. Brief Statement of Facts.

Barbara Wilson is a full-blooded Navajo Indian. Her daughter, Sahira Zaman, is eligible for membership in the Navajo Nation. For several years, Ms. Wilson and Akhtar Zaman engaged in a romantic relationship within the confines of the Navajo Indian Reservation. Both Ms. Wilson and Mr. Zaman were employed by the Navajo Tribe. All three of them – father, mother, and child – lived on the Navajo Nation Indian Reservation during all time periods relevant to this action.

During an act of sexual intercourse that occurred on the Navajo Indian Reservation, Barbara Wilson became pregnant on or about January 15, 1986. When the child was born, both Barbara Wilson and Akhtar Zaman continued to reside in Window Rock, Arizona, within the confines of the Navajo Indian Reservation. Although the minor child was born in Gallup, New Mexico (off of the Navajo Indian Reservation), the parties did not carry on a personal, romantic relationship off the Navajo Indian Reservation and within Apache County at any time. Mr. Zaman and Ms. Wilson never traveled together in Apache County, Arizona, outside of the Navajo Indian Reservation; they never had any contact with each other or with the minor child within Apache County, Arizona, outside of the parameters of the Navajo Indian Reservation.

As conceded in the State's Petition for Review, Barbara Wilson continued to reside on the Navajo Indian Reservation until late June, 1989 (Motion for Reconsideration at p. 1, line 22; Petition for Review at p. 3). The State of Arizona initiated a paternity action against Mr. Zaman on September 15, 1988. All interested persons were residents of the Navajo Nation Reservation at the time that the action was filed.

B. The Proceedings Below Focused on Important Questions of Federal Indian Law.

Mr. Zaman attacked the subject-matter jurisdiction of the Apache County Superior Court to render judgment against him as a matter of federal Indian law, specifically the "infringement test" of *Williams v. Lee*, 358 U.S. 217 (1959). Jurisdiction was tested both through a motion to dismiss and a motion for summary judgment. In both instances, the Apache County Superior Court asserted in conclusory terms that the State of Arizona possessed subject matter jurisdiction.

On October 8, 1992, the Apache County Superior Court, acting through visiting Judge J. M. Abbey, entered the following minute entry:

> A perusal of Federal Indian Law by Felix S. Cohen, 1982 edition, a noted authority, and the authorities cited therein, and the Law cited by the parties, leads this Court to conclude:
>
> That the COURT has concurrent jurisdiction with the Navajo Tribal Court. Therefore the Motion for Summary Judgment is denied.

[Appx. at p. 1a]. During June 1993, the case proceeded to trial. The trial court formally established paternity and child support. [Decision and Order dated January 26, 1994, Appx. at p. 3a]. Mr. Zaman filed a timely notice of appeal on February 11, 1994, which challenged the jurisdiction of the trial court [Appx. at p. 7a].

On March 11, 1996, the Arizona Court of Appeals, Division One, issue a published decision which reversed the decision of the trial court and held that the state court did not have subject matter jurisdiction over the paternity action. 187 Ariz. 81, 927 P.2d 347 (App., Div. One, 1996).

The Arizona Court of Appeals recognized the importance of the Navajo treaty and Public Law 280.[1] It applied federal Indian law, including the "infringement test" of *Williams v. Lee*:

> In 1868, the United States signed a treaty with the Navajo Nation which set aside land in Arizona, New Mexico and Utah for the 'exclusive use and occupation of' the Navajos in return for a promise to maintain peace. 15 Stat. 667 (1868). The treaty guaranteed that only authorized agents of the United States government would be permitted within the reserved land. By limiting intrusion on the reservation in this manner, the treaty implicitly provided that 'the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed.' *Williams*, 358 U.S. at 221-22.
>
> Congress has acted consistently with the principle that the states lack jurisdiction over Native Americans living on reserved lands absent an act of Congress permitting such jurisdiction. When Arizona became a state, 36 Stat. 557, 568-79 (1910), its entry into the Union was expressly conditioned upon its adoption of a constitutional provision disclaiming right and title to reservation lands. *See* Ariz. Const. Art. 20, Sec. 4. However, Congress later provided the states with a means to assume jurisdiction over the reservations. Public Law 280, enacted in 1953, delegated jurisdiction to several states and permitted other states, such as Arizona, to disregard the constitutional language mandated by their enabling acts and assert by legislation

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[1] Act of Aug. 15, 1953, ch. 505,57 Stat. 588, *codified as amended* at Titles 18 U.S.C. § 1162 (1984) 25 U.S.C. §§ 1321-1326 (1983), and 28 U.S.C. § 1360 (1993) It retains its familiar designation as "Public Law 280."

> jurisdiction over reservation lands falling within the states' borders. Fifteen years later, Congress passed the Indian Civil Rights Act, 25 U.S.C. §§ 1301 *et seq.*, which in part modified Public Law 280 by requiring states wishing to assume jurisdiction over Indian lands to first secure the affected tribes' consent. 25 U.S.C. §§ 1321, 1322. Desirous states must also amend their constitutions and/or statutes to reflect their assumption of jurisdiction. 25 U.S.C. § 1324. While several states did assume complete jurisdiction, Arizona, generally did not. [cites omitted].
>
> * * *
>
> Thus, at its core, this litigation involves two Navajos residing within their Nation and a non-Navajo who moved to the Nation, subjecting himself to Navajo law. As the Supreme Court stated in *Williams [v. Lee*, 358 U.S. 217 (1959)], '[i]t is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there.' 358 U.S. at 223.

State v. Zaman, 187 Ariz. 81, 84, 86-87, 927 P.2d 347, 350, 352-53 (App., Div. One, 1996). The Arizona Court of Appeals analyzed opinions from several state supreme courts that reached opposing conclusions regarding state court jurisdiction over domestic relations actions arising from Indian country. It decided that the Navajo Nation had jurisdiction, but that Arizona did not.

The Arizona Supreme Court reached the opposite conclusion and held that the state trial court had jurisdiction over the paternity action initiated by the State of Arizona against Akhtar Zaman, but agreed that the issue of jurisdiction was one of federal Indian Law. The Arizona Supreme Court viewed jurisdiction in terms of "immunity" for individual Indians, a novel position. The analysis of the highest Arizona court surprisingly concluded that the nature of the case, the situs of the case,

the interest of the Navajo Nation and its courts, and the residence of the parties was irrelevant because a non-Indian defendant existed.

> Zaman, a non-Indian, seeks to use a protection afforded Indians to defeat the claim of an Indian who chooses the state forum. This attempt to clothe oneself in the immunity afforded another has already been rejected by the Supreme Court. *Wold I*, 467 U.S. at 148, 104 S. Ct. at 2274. [Emphasis added].
>
> The Indian interests which the infringement test seeks to protect are not present when an Indian plaintiff brings an action against a non-Indian defendant in state court. So long as the Indian party selects the state forum, there is nothing for the infringement test to protect against.
>
> * * *
>
> The infringement test protects Indians. It is not an offensive tool to be used against them. Thus, the infringement test will not preclude state court jurisdiction where an Indian plaintiff brings an action against a non-Indian defendant. *See id.* at 148-49, 104 S. Ct. at 2274.
>
> * * *
>
> We are unaware of any Supreme Court case that has considered the collective interests of the tribe, in contrast to an Indian's rights, in determining the adjudicatory authority of state courts under the infringement test. 'Tribal interests' have been used as a backdrop for the interpretation of federal law in preemption cases, *Three Affiliated Tribes v. Wold Eng'g (Wold II)*, 476 U.S. 877, 884, 106 S. Ct. 2305, 2310 (1986), and in regulatory actions concerning tribal enterprises and government programs [cite omitted]. But in actions involving the rights and interests of individual Indians, the relevant inquiry is the infringement of individual rights.

* * *

State court jurisdiction over actions brought by Indians against non-Indians does not infringe upon the rights of Indians to make their own laws and to be ruled by them. *Wold I*, 467 U.S. at 148, 104 S. Ct. at 2274. But Indian rights would be infringed if we permitted a non-Indian to challenge an Indian's choice of the state forum. Members of tribes are citizens of the United States and of the state in which they reside and thus have the right to bring actions in state court. *McClanahan*, 411 U.S. at 172-73, 93 S. Ct. at 1262. This right would be substantially hindered if non-Indians could prevent Indians from seeking redress in state court.

* * *

Montana extended into the civil context the general principle expressed in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011 (1978), that the inherent sovereign authority of tribes does not include the right to exercise jurisdiction over non-Indian defendants. *Montana*, 450 U.S. at 565, 101 S. Ct. at 1258. '[T]he Indian tribes have lost any "right of governing every person within their limits except themselves." ' *Id.* (quoting *Fletcher v. Peck*, 6 Cranch 87, 147, 3 L. Ed. 162 (1810) (Johnson J., concurring)). Tribal courts do not have civil jurisdiction over nonmembers unless one of two exceptions applies. *Montana*, 450 U.S. at 565, 101 S. Ct. at 1258. First, tribal courts may exercise jurisdiction over non-Indians who engage in consensual business relationships with tribes. *Strate*, ___ U.S. at ___, 117 S. Ct. at 1415 [cite omitted]. Second, tribal courts have jurisdiction over conduct on fee lands within the reservation if the conduct 'threatens or has some direct effect on the political integrity, the economic

> security, or the health or welfare of the tribe.' *Montana*, 450 U.S. at 566, 101 S. Ct. at 1258.
>
> Child welfare actions do not involve consensual business relations and therefore do not fall within the first *Montana* exception. Child welfare actions may affect the welfare of the tribe and thus arguably fall within the second *Montana* exception. But *Strate* warned that this second exception should not be interpreted so that 'the exception . . . severely shrink[s] the rule.' *Strate*, ___ U.S. ___, 117 S. Ct. at 1415.
>
> * * *
>
> Wilson, as Sahira's mother, has a right to bring this action in state court. There is no countervailing tribal interest in helping Zaman, a non-Indian, escape his legal obligations to Wilson, a member of the Navajo Tribe, and Sahira, a child eligible for membership in the Tribe. Tribal court jurisdiction exists for the protection and benefit of tribal members. It would stand federal Indian law on its head to allow a non-Indian to exploit a tribal immunity to the disadvantage of a tribal member and her child. The state court properly exercised subject matter jurisdiction.

State v. Zaman, 254 Ariz. Adv. Rep. 8, 9-11 (1997).

The Supreme Court of the Navajo Nation concurred with the opinion of the Arizona Court of Appeals and refused to recognize or enforce the paternity judgment from the Arizona state court. *Wilson v. Zaman* SC-CV-44-95 (Navajo 1996). To say the least, a split exists. The groundwork for a deep rift has been created. The Arizona Supreme Court refused to recognize the validity of orders from the Navajo Nation courts, while the Navajo Nation Supreme Court refused to recognize the validity of the judgment of the Arizona court.

III. REASONS FOR GRANTING THE PETITION.

A. The *Zaman* Decision by the Arizona Supreme Court Decided an Important Federal Question in a Way That Conflicts with Relevant Decisions of This Court.

1. The Arizona Supreme Court Not Only Rendered a Decision that is Inconsistent With Leading Precedent From This Court, But It Totally Misapplied and Contradicted Fundamental Supreme Court Precedent in the Field of Federal Indian Law.

The Arizona Supreme Court decided an important federal question in a way that conflicts with relevant decisions of this Court in fundamental respects. The Arizona Supreme Court **DID NOT** weigh the competing jurisdictional interests between the Navajo Nation and the Arizona state courts, deciding that the "infringement test" of *Williams v. Lee*, 358 U.S. 217 (1959), was totally inapplicable.

The Arizona Supreme Court relied upon, but greatly misperceived and misapplied, this Court's recent decision in *Strate v. A-I Contractors*, 520 U.S. ___, 117 S. Ct. 1404 (1997), the "pathmarking case" of *Montana v. United States*, 450 U.S. 544 (1981), and *Williams v. Lee*, 358 U.S. 217 (1959). While *Montana* may be the "pathmarking case", the Arizona Supreme Court took the wrong trail.

The Arizona Supreme Court concluded that the general rule or presumption in *Montana* applied, but neither of its two exceptions.

> *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245 (1981), remains as the 'pathmarking case concerning tribal civil authority over non-member.' *Strate*, ___ U.S. at ___, 117 S. Ct. at 1409. . . .
>
> Tribal courts do not have civil jurisdiction over nonmembers unless one of two exceptions

> applies. *Montana,* 450 U.S. at 565, 101 S. Ct. at 1258.

State v. Zaman, 254 Ariz. Adv. Rep. 8, 10-11 (1997).

The problem is that the so-called *Montana* rule is **not** the "pathmarking case" that controls Mr. Zaman's case. The *Montana* rule presumptively provides that "the civil authority of Indian tribes and their courts with respect to non-Indian fee lands generally 'does not extend to the activities of nonmembers of the tribe.' " *Strate,* 117 S. Ct. at 1413. In Section II.(B) of *Strate,* Justice Ginsburg made it exceedingly clear that "*Montana's* general rule and exceptions to it" only control the outcome of disputes arising from "alienated, non-Indian land" [*Montana*] or a "right-of-way . . . acquired for the State's highway" [*Strate*] or its "equivalent." *Strate,* 117 S. Ct. 1404, 1411, 1414 (1997).

> So long as the stretch is maintained as part of the State's highway, the tribes cannot assert a landowner's right to occupy and exclude . . . We therefore align the right-of-way, for the purpose at hand, with land alienated to non-Indians. Our decision in *Montana,* accordingly, governs this case.

Strate, 117 S. Ct. 1404, 1414 (1997).

The Arizona Supreme Court's decision in *Zaman* is fundamentally wrong because it applied the wrong test. As punctuated by this Court's decision in *Strate,* the "tribes retain considerable control over nonmember conduct on tribal land." The *Zaman* case arose from the Navajo Nation's capital rather than non-Indian fee land. The Arizona Supreme Court completely misconstrued substantial precedent from this Court by applying the "*Montana* presumption" to the *Zaman* case. The Arizona Supreme Court should have applied the "infringement test" of *Williams v. Lee.* The fundamental error made by the Arizona Supreme Court "conflicts with relevant decisions of this Court" and alarmingly contradicts the premise of Indian jurisdictional authority.

In *Montana,* this Court repeatedly recognized, as punctuated in *Strate,* that the decision and analysis was

limited to tribal regulation over "non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the tribe."

> Though the parties in this case have raised broad questions about the power of the Tribe to regulate hunting and fishing by non-Indians on the reservation, the regulatory issue before us is a narrow one . . . Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government and internal relations, general principles to retain inherent sovereignty did not authorize the Crow Tribe to adopt resolution number 74-05.

Montana, 450 U.S. 544, at 557, 564-6 (1981).

In light of the Arizona Supreme Court's misconstruction of *Strate* and *Montana*, it is not surprising that there is not only a split between the *Zaman* decision and the decisions of various other state supreme courts, but there is a standoff between the Arizona Supreme Court and the Supreme Court of the Navajo Nation. The Navajo Nation contends that domestic relations disputes arising between members and residents on tribal land rest at the "core of the tribe's internal and social relations", while the Arizona Supreme Court, impermissibly relying upon the limited tests set forth in *Montana* and *Strate*, found no tribal interest whatsoever.

If the standoff and mistaken decision by the Arizona Supreme Court is not resolved by this Court, a deep rift will unnecessarily divide Arizona, the Navajo Nation, and other Indian nations within Arizona. Moreover, the decision from the Arizona Supreme Court will impermissibly guide lower courts throughout the country and cause havoc in the field of federal Indian law.

2. The Arizona Supreme Court Contradicted Leading Supreme Court Precedent in the Field of Federal Indian Law by Failing to Apply the "Infringement Test" of *Williams v. Lee* and by Failing to Consider or Weigh Important Tribal Interests.

The Arizona Supreme Court held that the "infringement test" of *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269 (1959), is irrelevant and does not apply to any case initiated by a state entity on behalf of an Indian against any non-Indian. The Arizona Supreme Court refused to give any weight to the situs of the case, the relationship between the parties and the Indian Nation, the fact that both parties were residents of the Indian Nation, and the fact that the nature of the case involves intimate, social relations between tribal members, residents, and employees. After erroneously applying the *Montana* presumption, the Arizona Supreme Court then examined the "two exceptions" to the *Montana* presumption and mistakenly concluded that neither applied.

Unfortunately, neither the "presumption" nor the "two exceptions" from *Montana* govern Mr. Zaman's case. If they did, clear "tribal interests" would trigger the exceptions.

In an attempt to apply this Court's recent holding in *Strate v. A-1 Contractors*, ___ U.S. ___, 117 S. Ct. 1404 (1997), the Arizona Supreme Court held that the Navajo Nation had no "tribal interest" in the paternity action filed by the State in behalf of Barbara Wilson, a Navajo, against Akhtar Zaman, a non-Indian living and working within the Navajo Nation, notwithstanding the fact that the action arose exclusively from activity and relationships within the confines of the Navajo Nation:

> So long as the Indian parties select the state forum, there is nothing for the infringement test to protect against.

* * *

> We are unaware of any Supreme Court case that has considered the collective interest of the tribe in contrast to an Indian's rights in determining that adjudicatory authority of state courts under the infringement test.
>
> * * *
>
> The adjudicatory authority of state courts in matters involving an Indian party depend upon the Indian parties' interest, not on the interest of the tribe as a whole.

State v. Zaman, 254 Ariz. Adv. R. 8, 9-10 (1997).

In *Strate v. A-1 Contractors*, this Court held that the Three Affiliated Tribes did not have a sufficient "tribal interest" over an automobile accident on a State right-of-way acquired by North Dakota that involved only non-Indian non-residents. In contrast to *Zaman*, the only identifiable "tribal interest" under *United States v. Montana*, 450 U.S. 565, was that of territorial jurisdiction.

The Arizona Supreme Court's conclusion undermines decades of federal Indian law decided by this Court, and conflicts with leading authority from numerous other courts. As recognized by the Arizona Court of Appeals in *Zaman*:

> If the determination of a contract matter involves the authority of tribal courts over reservation affairs, then so must the determination of a more intimate domestic-relations matter.

State v. Zaman, 187 Ariz. 81, 85, 927 P.2d 347, 351 (App., Div. One, 1996), *reversed*, 254 Ariz. Adv. R. 8 (1997). Clearly, the "infringement test" of *Williams v. Lee* has been met. Yet, a "tribal interest" exists to defeat state court jurisdiction even if we assume that the *Montana* presumption and two exceptions apply. " . . . Tribal Courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and

non-Indians. [cites omitted]." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

While the Arizona Supreme Court held that the "choice" of an Indian plaintiff (or state entity on behalf of an Indian) is flatly determinative of jurisdiction in favor of state court in any and every dispute arising from Indian country against a non-Indian, this Court in *Fisher v. District Court* provided otherwise.

> Moreover, even if a jurisdictional holding occasionally resulted in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.

Fisher, 424 U.S. at 390-391. According to this Court in *Santa Clara Pueblo v. Martinez*, "In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.' " 436 U.S. 49, 62 (1978). In contrast, the Arizona Supreme Court boldly asserted, "We are unaware of any Supreme Court case that has considered the collective interests of the tribe, in contrast to an Indian's rights, in determining adjudicatory authority of state courts under the "infringement test." *State v. Zaman*, 254 Ariz. Adv. R. 8, 9 (1997).

Contrary to the Arizona Supreme Court's decision, this Court has held that the exclusive jurisdiction of the tribal court does not arise "from the race of the plaintiff, but rather from the quasi-sovereign status of the Northern Cheyenne Tribe . . . " *Fisher*, 424 U.S. at 390. It is appropriate to predicate jurisdiction on the residence of the litigants. *Fisher* at n. 14. The Arizona Supreme Court ignored the residence of both parties as irrelevant.

This "Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty." "Reservation boundar[ies]" is "an important factor to weigh in determining if state action has exceeded the permissible limits." *White Mountain Apache v. Bracker*, 448 U.S. 136, 151 (1980). Indians tribes "possess a certain degree of independent authority over matters that affect internal social relations." *United States v. Mazurrie*, 419 U.S. 544, 556-57 (1975). Indian tribes possess "the power of regulating their internal and social relations . . . " which includes nonmembers who consensually join and live with them. *United States v. Kagama*, 118 U.S. 375, 381-82 (1886). "[A] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members. . . . " *Brendale v. Confederated Tribes*, 492 U.S. 408, 428 (1989). Indian tribes possess "attributes of sovereignty over both their members and their territory." *Worcester v. Georgia*, 6 Pet. 515, 557 (1832); *Brendale v. Confederated Tribes and Boards of Yakima Indian Nation*, 492 U.S. 408, 427-28 (1989).

Indian tribes have exclusive jurisdiction over disputes affecting interests of both Indians and non-Indians which arise on the reservation. If the tribe does not exercise jurisdiction, then the state may do so. *R. J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979 (9th Cir. 1983), *cert. denied*, 472 U.S. 1016 (1985). In *Williams v. Lee*, 358 U.S. 217, 223 (1959), the Navajo Nation had exclusive jurisdiction over a contract action between an Indian and non-Indian that arose from the Navajo Nation. "It is immaterial that [the plaintiff] is not an Indian. He was on the reservation and the transaction with an Indian took place there . . . The cases in this Court have consistently guarded the authority of Indian governments over their reservations." *Ibid.* "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over **reservation affairs** and hence would infringe on the

right of the Indians to govern themselves." (emphasis added) *Ibid.*

"Tribal authority over activities of non-Indians on reservation lands is an important part of sovereignty." *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 18 (1987). "The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute." *Ibid.* at p. 14. Also see, *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 427-28 (1989). "The United States Supreme Court has repeatedly recognized that tribal courts have inherent power to adjudicate civil disputes affecting the interests of Indians and non-Indians which are based upon events occurring on the reservation." *Begay v. Roberts*, 167 Ariz. 375, 378, 807 P.2d 1111 (App., Div. One, 1990). Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest. *Washington v. Confederated Tribes*, 447 U.S. 134, 153 (1980). Also see, *Morris v. Hitchcock*, 194 U.S. 384 (1904) (Indian tax on non-Indian cattle on Indian Country).[2]

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[2] On the other hand, residence or presence or activity on an Indian reservation does not constitute presence, residence, or activity within the state for jurisdictional purposes. See, e g., *Martinez v. Superior Court of La Paz County*, 152 Ariz. 300, 303, 731 P.2d 1244, 1247 (Ariz. App. 1987) (presence on the reservation is not presence in the State for purposes of jurisdiction) *Dixon v. Picopa Construction Co.*, 160 Ariz. 251, 772 P.2d 1104 (1989) (Indian reservation is foreign jurisdiction for service of process); *Byzewski v. Byzewski*, 429 N.W. 394, 399 (N.D. 1988) (domicile on the Indian reservation is not an in-state contact for state jurisdiction); *Wells v. Wells*, 451 N.W.2d 2 (S.D. 1990) (a resident of the reservation is not a resident of the county for purposes of jurisdiction, *Henderson J., concurring*); *Whyte v. District Court of Montezuma County*, 346 P.2d 1012 (Col. 1959) (no matter that the reservation is within Colorado); *State ex rel. Flammond v. Flammond*, 621 P.2d 471, 472 (Mont. 1980) ("It

The *Williams v. Lee* "infringement test" applies primarily to litigation and disputes arising out of conduct between Indians and non-Indians. *Fisher*, 442 U.S. at 386; *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 179 (1973). When both a tribe and a state may claim an interest in their respective jurisdictions, the *Williams* test is designed to resolve the conflict by providing that the State can protect its interests up to the point where tribal self-government would be affected. *McClanahan*, 411 U.S. 164, 179 (1973).[3] In conflicting or competing jurisdiction over domestic relations, state courts should abstain while tribal courts render decisions regarding the domestic affairs between its members and residents. *State ex rel.*

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is well settled that domicile on the reservation is not in-state contact" for state court jurisdiction.); *Navajo Nation v. McDonald*, 180 Ariz. 539, 885 P.2d 1104 (App., Div. One, 1994) (significant contacts off the reservation required to uphold jurisdiction).

State court jurisdiction does not apply over matters that occur on the reservation. *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138 (1984); *R. J. Williams Co. v. Fort Belknap Housing Authority*, 719 F.2d 979, 983 (9th Cir. 1983); *State ex rel. Iron Bear v. District Court*, 512 P.2d 1292 (Mont. 1973); *Milbank Mutual Ins. Co. v. Eagleman*, 705 P.2d 1117 (Mont. 1985); *Martinez v. Superior Court of La Paz County*, 152 Ariz. 300, 303, 731 P.2d 1244, 1246 (App., Div. One, 1987).

[3] Also see, e.g., *Iowa ex rel. Vega v. Medina*, 549 N.W.2d 507 (Iowa 1996) (state jurisdiction over paternity action involving Indian exists where relationship of parents, conception, and birth of child occurred off-reservation); *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 381 (Minn. App. 1996) ("If the disputed events occurred wholly within the confines of an Indian reservation, state court jurisdiction over the matter interferes with tribal self-governance."); *Snooks v. Ninth Judicial District of Nevada, et al.*, 919 P.2d 1064 (Nev. 1996); *Hinshaw v. Mahler*, 42 F.3d 1178, 1181 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 485 (1994); *Wilson v. Marchington, et al.*, 934 F.Supp. 1176 (D. Montana 1995); *Begay v. Roberts*, 167 Ariz. 375, 807 P.2d 1111 (App., Div. One, 1990) (a writ of garnishment against one Indian caused "infringement").

Stewart v. District Court, 609 P.2d 290 (Mont. 1990); *In re Marriage of Limpy*, 636 P.2d 266 (Mont. 1981); *A. O. a Minor*, 5 Nav. Rptr. 285 (1987); F. Cohen, *Handbook of Federal Indian Law*, p. 349 n. 13. (Michie, 1982 ed.).

Because all of the underlying activities or "contacts" arose from the Navajo Indian Reservation, the only articulable reason to support State jurisdiction rests upon the theory that a Navajo plaintiff should be allowed to engage in forum shopping that clearly would not be allowed to any other plaintiff seeking jurisdiction over a non-resident defendant. We believe that this case should be decided upon "contacts", not forum shopping. The racial exception invented by the Arizona Supreme Court has never been adopted by any other Court and should not be approved here.

The Arizona Supreme Court did not review "contacts" or weigh competing interests. It found that the racial status of the person benefitting from the action initiated by a state entity against a non-Indian resident of the reservation was not only outcome determinative, but the exclusive factor to consider. The race factor supplanted the "infringement test" of *Williams v. Lee*.

The Arizona test will lead to absurd results, substantially erode Indian jurisdiction and authority, allow Arizona to exercise jurisdiction over Indian country even though it is not a Public Law 280 state, and will undermine decades of federal Indian law.

B. A State Court of Last Resort Has Decided an Important Federal Question in a Way That Conflicts with the Decision of Another State Court of Last Resort or of the United States Court of Appeals or of an Indian Nation Court of Last Resort.

1. The Decision of the Arizona Supreme Court is Directly Contradicted by the Supreme Court of the Navajo Nation, the Arizona Court of Appeals, and the Navajo District Court. A Standoff Has Resulted.

The Apache County Court found "concurrent jurisdiction" while the Arizona Supreme Court declined to apply the "infringement test" of *Williams v. Lee* because it "protects [individual] Indians", not the tribe of Indians nor tribal court jurisdiction. Because the Indian mother of the minor Indian child, reportedly allowed the State to bring the action in Apache County, Arizona, her purported "choice" of forum overrode the "infringement test" according to the Arizona Supreme Court. The Arizona Supreme Court essentially ruled that an Indian plaintiff may "trump" tribal court jurisdiction by bringing **any** action in State court against a non-Indian.[4] If the Indian plaintiff brings such an action in State court, the

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[4] While the state of Arizona argues that an Indian plaintiff can choose the State court forum for causes of action arising within Indian Country, it is important to point out that the plaintiff in this case is the State of Arizona, not Barbara Wilson. Although she may be an interested person, the State of Arizona initiated this action against Mr. Zaman. We do not believe that the State of Arizona can vest state court with subject matter jurisdiction as if it was an Indian plaintiff. Even if Indian plaintiffs can vest state court with subject matter jurisdiction by choosing the latter forum with Midas-like touch, we do not believe that the same privilege should be extended to the state of Arizona as plaintiff.

"infringement test" is wholly inapplicable, according to the Arizona Supreme Court, in **every** case.

Both the Arizona Court of Appeals and the Supreme Court of the Navajo Nation reached the opposite conclusion. The decision of the Arizona Court of Appeals held that the "infringement test" of *Williams v. Lee* precluded the exercise of State court jurisdiction. It found that the Navajo Nation not only had inherent power to adjudicate the paternity case that arose from its land and involved two of its members and all of its residents, but that the Navajo Nation courts had exclusive jurisdiction to decide the issue of paternity.

> In this case, there are no contacts with the State outside the Navajo Nation's boundaries.
>
> Consequently, the State court may not exercise subject-matter jurisdiction.

State v. Zaman, 187 Ariz. 81, 89, 927 P.2d 347, 355 (App., Div. One, 1996).

The Navajo Nation District Court for the District of Window Rock and the Supreme Court of the Navajo Nation both concluded that the Arizona state court did not have subject matter jurisdiction over the paternity action that unquestionably arose from the Navajo Indian Reservation. Three of the five courts that have reviewed this issue have concluded that Arizona state court did not have subject matter jurisdiction.

The Navajo District Court reviewed the decision of Apache County, Arizona, when Barbara Wilson attempted to enforce the Arizona judgment within the boundaries of the Navajo Nation, where Akhtar Zaman continues to work and live.

> On June 21, 1994, petitioner [Barbara Wilson] filed a petition for recognition and enforcement of a foreign judgment seeking to enforce the provisions of the Arizona Order of January 26, 1994. Petitioner seeks to garnish or assign respondent's wages.

* * *

> This paternity action arises from a relationship between Petitioner, an enrolled member of the Navajo Nation, and Respondent, a non-Indian. At the time of their relationship, both were residents of the Navajo Nation. Their relationship occurred totally within the exterior boundaries of the Navajo Nation and resulted in the birth of a Navajo child.
>
> These facts establish the Arizona Court does not have subject matter jurisdiction.
>
> IT IS THEREFORE ORDERED the court declines to exercise comity due to lack of State court jurisdiction.

Order granting Motion to Dismiss issued by the Navajo Nation Family Court on September 22, 1995 [Appx. at pp. 9a-12a]. Similarly, the Supreme Court of the Navajo Nation found that the state court in Apache County did not have subject matter jurisdiction and affirmed the decision of the Navajo Nation Family Court.

> The family court's order correctly sets forth the Navajo law on recognition of foreign judgments in the Navajo Nation courts. In this case, the Arizona court did not have subject matter jurisdiction over the paternity action; therefore, its judgment over that matter is invalid. See *State of Arizona v. Akhtar Zaman*, No. 1 CA-CV-94-0259, Ariz. Ct. of App. Div I, March 11, 1996. A foreign court that enters judgment over an action in which it has no subject matter jurisdiction enters an invalid judgment. That judgment cannot be recognized and enforced in the Navajo Nation courts . . .
>
> The Appellant will have to file an action for paternity in the family court and then seek to introduce some of the evidence she gathered for the state court proceeding. Admission of that evidence is within the authority of the family court.

Wilson v. Zaman, SC-CV-44-95 (Navajo 1996).

The Navajo Supreme Court refused to recognize the validity or jurisdiction of the Arizona judgment, while the Arizona Supreme Court refused to recognize the validity or jurisdiction of the Navajo court. This case represents the extreme example of conflict between the highest courts of competing jurisdictions.

In spite of the opinion by the Navajo Supreme Court that Navajo courts have exclusive jurisdiction over this paternity action, the Arizona Supreme Court found that Navajo jurisdiction was "an uncertain proposition at best." 254 Ariz. Adv. R. 8, 10 (1997). As recognized by both the Navajo Supreme Court and the Arizona Court of Appeals, "The Navajo Supreme Court justifiably has called domestic relations the "core of the tribe's internal and social relations'." *State v. Zaman*, 187 Ariz. 81, 85, 927 P.2d 347, 351 (App., Div. One, 1996), quoting from *Billie v. Abbott*, 6 Nav. Rptr. 146, 16 Indian L. Rptr. 6021, 6022 (Navajo 1988). In *Billie*, the Navajo Supreme Court held that a Utah State official infringed on Navajo self-government when he intercepted the federal income tax return of a Navajo resident to reimburse the state for money paid to the mother of Billie's child under the Aid to Families with Dependent Children (AFDC) Program.

> The Navajo Nation's exclusive power to regulate domestic relations among Navajos living within its borders is beyond doubt. The Navajo Nation has codified law and case law regulating Navajo domestic relations. And the Navajo Nation's right to make its own laws and be ruled by them is an established principle in Indian law. *Williams v. Lee*, 358 U.S. 217 (1959); *United States v. Wheeler*, 435 U.S. 313 (1978).

Billie, 16 Ind. L. Rptr. at 6022-23 (Navajo 1988).

Although the split between state courts regarding Indian jurisdiction over maternity and paternity matters was completely avoided by the Arizona Supreme Court, the split was discussed and analyzed by the Arizona Court of Appeals. 187 Ariz. 81, 86, 927 P.2d 347, 352

(App., Div. One, 1996). The split between the Supreme Court of the Navajo Nation and the Arizona Supreme Court represents the latest, but growing conflict between the highest courts of several states.

The North Carolina Supreme Court supports the conclusion of the Arizona Court of Appeals and the Navajo Nation Supreme Court. Its decision contradicts the finding of no "tribal interest" rendered by the Arizona Supreme Court.

> The determination of the paternity of an Indian child is of special interest to tribal self-governance, the right of reservation Indians to make their own laws and be governed by them. Such determination strikes at the essence of the tribe's internal and social relations.

Jackson County by and through Child Support Enforcement Agency, ex rel. Jackson v. Swayney, 319 N.C 52, 352 S.E.2d 413, 418-19 (N.C.), *cert. denied,* 484 U.S. 826 (1987). Similar conclusions were reached in *State ex rel. Flammond v. Flammond,* 621 P.2d 471 (Mont. 1980), and *State ex rel. Three Irons v. Three Irons,* 621 P.2d 476 (Mont. 1980).

Contrary to *Swayney,* however, the New Mexico Supreme Court in *State ex rel. Dept of Human Services v. Jojola,* 660 P.2d 590, 593 (N.M. 1983), *cert. denied,* 464 U.S. 803 (1983) did not find any "infringement" in proceedings instituted by state agencies in order to recoup welfare payments given to an Indian mother living on an Indian reservation. *Jojola* resulted in the erroneous conclusion that the subject matter jurisdiction was vested in state courts on the questionable basis that a significant off-reservation contact existed between the mother and the state welfare agency. The ability of state agencies, including the Apache County Attorney, to bring actions relating to domestic relations cases arising from an Indian Country is raised in a series of competing cases reaching sharply contradictory results, including Mr. Zaman's case. In *Jojola,* the New Mexico Supreme Court held that the "cause of action arose outside of the reservation when

the natural mother of the minor child filed and obtained public assistance and assigned their support rights to the DHS." *Jojola* at 593.

The decision of the Navajo Supreme Court in *Zaman and* the decision of the North Carolina Supreme Court in *Swaney* is reinforced by the decision of the Supreme Court of Iowa in *State v. Whitebreast*, 409 N.W.2d 460 (Iowa 1987). Contrary to *Jojola*, the Iowa Supreme Court found that it did not have subject matter jurisdiction over actions by state agencies for reimbursement of support from an Indian father even though Iowa is a Public Law 280 state. A deep split exists between numerous states.

C. A State Court of Last Resort Decided an Important Question of Federal Indian Law That Has Not, But Should Be, Settled by This Court.

Both the State of Arizona and the Arizona Supreme Court relied upon the following language from *Wold Engineering*:

> This Court, however, repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims arose in Indian Country. See, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. at 173, 36 L.Ed.2d 129, 93 S. Ct. 1257 at 173, 36 L.Ed.2d 129, 93 S. Ct. 1257 (dictum); *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 19 L.Ed.2d 251, 99 S. Ct. 982 (1968); *Williams v. Lee*, 358 U.S. at 219, 3 L.Ed.2d 251, 79 S. Ct. 269 (dictum); *United States v. Candelaria*, 271 U.S. 432, 444, 70 L.Ed. 1023, 46 S. Ct. 561 (1926); *Felix v. Patrick*, 145 U.S. 317, 332, 36 L.Ed. 719, 12 S. Ct. 862 (1892); *Fellows v. Blacksmith*, 19 How. 366, 16 L.Ed. 684 (1857). The interests implicated in such cases are very different from those present in *Williams v. Lee*, where a non-Indian sued an Indian in state court for debts incurred in Indian

> Country, or in *Fisher v. District Court,* where this Court held that a tribal court had exclusive jurisdiction over an adoption proceeding in which all parties were tribal Indians residing on a reservation. **As a general matter, tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian Country.** [Emphasis added].

Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138, 148-49 (1984). The unanswered question is whether the dictum in *Wold Engineering* allows any tribal member to trump tribal jurisdiction by bringing suit in state court even though the dispute admittedly arises from Indian Country.

The plaintiff in *Wold Engineering* was actually the tribe itself, not a member of the tribe. The tribal code of the Three Affiliated Tribes precluded tribal court jurisdiction over a non-Indian at the time that suit was filed in state court. The cause of action involved a suit for breach of contract on the part of the non-Indian company that resided in and regularly conducted business activity within the State of North Dakota.

> The exercise of State jurisdiction is particularly compatible with tribal autonomy when, as here, the suit is brought by the tribe itself and the Tribal Court lacks jurisdiction over the claim at the time the suit was instituted.

Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138, 148 (1984).

The defendant in *Wold Engineering* entered into a contract with the Tribe and provided services on the Fort Berthold Reservation. Wold Engineering was paid by the Tribe. The Tribe discovered, however, that the services rendered were deficient and sought to bring a claim against the non-resident, non-Indian defendant in order to obtain redress. Unfortunately, the Indian tribal code, like many tribal codes of its time, did not provide for civil

jurisdiction against non-Indians. As a result, the Tribe sued Wold Engineering in the State Court of South Dakota, where, incidentally, Wold Engineering resided and did business!

Could Wold Engineering be sued in its home, jurisdictional forum by an Indian tribe for breach of contract since its own tribal code did not allow personal jurisdiction over non-Indians in tribal court? Not surprisingly, the answer was "yes".

> As a general matter, tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian Country.
>
> * * *
>
> The exercise of State jurisdiction is particularly compatible with tribal autonomy **when, as here, the suit is brought by the tribe itself and the tribal court lacks jurisdiction over the claim at the time the suit was instituted.** [Emphasis added].

Wold Engineering, 467 U.S. 1381, 148 (1984).

As recognized by the Navajo Supreme Court, however, the Navajo Tribe not only recognizes jurisdiction over paternity actions, but such an action implicates "essential Navajo Tribal relations" and "firmly established Navajo cultural practices." *Billie v. Abbott*, 6 Nav. R. 146, 16 Ind. L. Rptr. 6021, 6022 (Navajo 1988).

The *Zaman* decision dictates that any Indian parent can engage in forum shopping simply because a non-Indian party exists.[5] State jurisdiction, according to the

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[5] If a non-Indian sued an Indian under the circumstances of this case for paternity in state court, then even the Arizona Supreme Court concedes that jurisdiction would be lacking. The opposite cannot be automatically true simply because the race of the parties is reversed. The distinction based upon race

Arizona Supreme Court, can be invoked against a non-Indian parent even though such jurisdiction could not be used against an Indian parent in similar circumstances. The key distinction is simply the race of the defendant. Yet, the traditional method of resolving jurisdictional disputes between competing forums has always centered upon contacts rather than race. The same rule not only applies here, but it applies with greater force because infringement upon tribal sovereignty is also at stake.

> Tribal courts play a vital role in tribal self-government, [cites omitted] and the Federal Government has consistently encouraged their development. Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, [cites omitted] their civil jurisdiction is not similarly restricted. [cites omitted]. If state court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the State courts are generally divested of jurisdiction as a matter of federal law. [cites omitted].

Iowa Mutual Insurance Company v. LaPlante, 480 U.S. 9, 15 (1987). As noted in *LaPlante*, the Supreme Court has "refused to foreclose Tribal Court jurisdiction over a civil dispute involving a non-Indian." *Ibid.* "Tribal authority over the activities of non-Indians on reservation land is an important part of tribal sovereignty [cites omitted]. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by specific treaty provision or federal statute." *LaPlante* at p. 17.

The time capsule and constraints that surround the *Wold Engineering* case must be placed in perspective when applying the decision more than a decade later. Tribal

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would lead to unfair discrimination – a distinction violative of the Fifth and Fourteenth amendments to the U.S. Constitution, *See, e.g., Simmons v. Eagle Sealatsee*, 244 F.Supp. 808, 814 (D. Oregon 1965), *affirmed*, 384 U.S. 209 (1966).

codes almost universally now provide for civil jurisdiction over non-Indians. See, Felix Cohen's *Federal Indian Law,* at pp. 342-43 (Michie Co., 1982 ed.). This Court has led the march not only to allow tribal courts to exercise jurisdiction over non-Indians; but to require tribal jurisdiction for cases arising within the boundaries of Indian reservations.

> Tribal courts play a vital role in tribal self-government, [cites omitted] and the Federal Government has consistently encouraged their development. Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, [cites omitted] their civil jurisdiction is not similarly restricted. If state-court jurisdiction over Indians **or activities on Indian lands** would interfere with tribal sovereignty and self-government, the State courts are generally divested of jurisdiction as a matter of federal law [cites omitted; emphasis added].

Iowa Mutual Insurance Company v. LaPlante, 480 U.S. 9, 15 (1987).

Tribal codes, federal Indian policies, and the advent of tribal self-determination have dramatically changed over the last decade. Tribal courts not only routinely allow for jurisdiction over non-Indians, they "presumptively" hold jurisdiction exclusively for events that occur on Indian land. "Tribal authority over the activities of non-Indians on reservation land is an important part of tribal sovereignty. [cites omitted]. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by specific treaty provision or federal statute." *Iowa Mutual Insurance Company v. LaPlante,* 480 U.S. 9, 17 (1987). Also see, *National Farmers Union Insurance Companies v. Crow Tribe,* 471 U.S. 845, 855 n.17 (1985).

Even Felix Cohen's original *Handbook on Federal Indian Law* (Univ. of N.M. 1942) recognized the territorial jurisdiction of Indian Tribes over internal and social affairs.

> In matters not affecting either the Federal Government or the tribal relations, an Indian has the same status to sue and be sued in state courts as any other citizen.
>
> It may be stated however, as a general proposition, that the state courts have no jurisdiction in civil matters affecting the restricted property or tribal relations of the Indians, unless otherwise provided by Congress, so long at least as the United States retains governmental control over them.

Felix Cohen's *Handbook of Federal Indian Law* at p. 379 (Univ. N.M. 1942). In short, Indian tribes possess criminal jurisdiction over their own members and broad civil jurisdiction over their own territory (excluding non-member fee land or state right-of-way land) absent affirmative action by Congress. See, *Duro v. Reina*, 495 U.S. 676 (1990).

According to the Arizona Supreme Court, any Indian who resides within the State of Arizona, whether or not she also resides on an Indian reservation, should be allowed to sue a non-Indian in state court regardless of the nature of the case or where the case arose. In other words, the "subject matter jurisdiction" of state courts should depend solely upon the decision of the Indian plaintiff in choosing to file in State court. Of course, the Indian plaintiff could choose to litigate the same claim in tribal court. In either event, the defendant would not only be helpless to contest jurisdiction; but the defendant could not institute the same case in state court himself. According to the *Zaman* decision, subject matter jurisdiction depends solely upon the Midas-like touch of the Indian plaintiff.

We contend, however, that the parties voluntarily placed jurisdiction in tribal court by engaging in purposeful activity on the reservation.

The *Zaman* decision purports to empower Indian people to possess the same rights and privileges as non-

Indians. However, the decision allows any Indian plaintiff to engage in forum shopping that is not allowed to non-Indians. The *Zaman* decision reduces the authority of Indian tribal courts and the power of Indian people to govern themselves. The *Zaman* decision allows internal, social relations among Indian people to be decided in State court at the choice of one of the litigants, yet irrespective of whether or not significant contacts exist within the forum chosen. State courts do not allow its residents to similarly veto state court jurisdiction. This Court's language, dictum, and principles in *Wold Engineering* should be re-examined and clarified.

IV. CONCLUSION

The Arizona Supreme Court has misapplied this Court's recent decision in *Strate v. A-1 Contractors* as well as the hallmark decision of *Montana v. United States*. The Arizona decision emasculates the "infringement test" of *Williams v. Lee* and undermines decades of fundamental precedent from the United States Supreme Court in the area of federal Indian law. The *Zaman* decision contradicts leading precedent from the United States Supreme Court, creates a split between Arizona and numerous other states, and causes a deep rift between Arizona and the Navajo Nation. The language and policies set forth by this Court in *Wold Engineering I* should be re-examined and clarified. This case resoundingly cries out for review by the United States Supreme Court. The *Zaman* decision must be examined and reversed.

Dated this 5th day of January, 1998.

TREBON & FINE, P.C.

JOHN TREBON
Attorney for Akhtar Zaman

No. _____

In The

Supreme Court of the United States

October Term, 1997

AKHTAR ZAMAN (TAHIRKHAILI),

Petitioner,

v.

THE STATE OF ARIZONA,

Respondent.

On Petition For Writ Of *Certiorari*
To The Arizona Supreme Court

APPENDIX TO PETITION FOR WRIT OF *CERTIORARI*

TABLE OF CONTENTS

Page

(1) ORDER dated October 8, 1992, denying Zaman's Motion for Summary Judgment 1a

(2) Decision and Order of Paternity by Apache County Superior Court dated January 26, 1994 ..... 3a

(3) Notice of Appeal dated February 8, 1994..... 7a

(4) Order granting Motion to Dismiss issued by the Navajo Nation Family Court on September 22, 1995 ..... 9a

(5) Decision of the Arizona Court of Appeals, Division One, dated May 1, 1996, published at 187 Ariz. 81, 927 P.2d 347 (App., Div. One, 1996).. 13a

(6) Decision of the Supreme Court of the Navajo Nation dated October 29, 1996 ..... 32a

(7) Decision of the Arizona Supreme Court dated October 9, 1997, published at 254 Ariz. Adv. R. 8 (1997)..... 34a

(8) Constitutional provisions, treaties, and statutes involved in this case:

(a) Public Law 280, Act of Aug. 15, 1953, ch. 505, 57 Stat. 558, *codified as amended* at Titles 18 U.S.C. § 1162 (1984), 25 U.S.C. §§ 1321-1326 (1983), and 28 U.S.C. § 1360 (1993) 46a

(b) Arizona Constitution, Art. 20, Sec. 4 (Disclaimer over Indian Land)..... 55a

(c) Navajo Treaty of 1868, 15 Stat. 667 (1868) ... 56a

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF APACHE

IN CHAMBERS (x) IN OPEN COURT ( )

HON. MICHAEL C. NELSON
Presiding Judge

HON. JAY M. ABBEY
Visiting Judge

COURT REPORTER: _____

RICHARD D. LUPKE, CLERK

By: Patricia Young, Deputy Clerk

CIVIL NO. 8631

STATE OF ARIZONA
Plaintiff

vs.

AKHTAR ZAMAN (TAHIRKHAILI)
Defendant

DATE: OCTOBER 08, 1992

TIME: 3:30 P.M.

MICHAEL GOIMARAC, Dep. Cty. Atty.
Attorney for Plaintiff

JOHN TREBON, P.C.
Attorney for Defendant

MINUTE ENTRY

A perusal of Federal Indian Law by Felix S. Cohen, 1982 edition, a noted authority, and the authorities cited therein, and the Law cited by the parties, lead this Court to conclude:

That the COURT has concurrent jurisdiction with the Navajo Tribal Court.

THEREFORE the Motion for Summary Judgment is denied.

xc: Michael G. Goimarac, Deputy County Attorney
John Trebon, Esq.
Hon. Jay M. Abbey

Recorded in Minute
Book 55, by PY

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF NAVAJO

STATE OF ARIZONA Plaintiff, vs. AKHTAR ZAMAN (TAHIRKHAILI) Defendant.	CASE NO. 8631 (APACHE COUNTY CASE) DECISION AND ORDER

The court has held a trial and received evidence by testimony and numerous exhibits, which the court has considered, reviewed and reconsidered. The court finds:

1. The defendant, Akhtar Zaman, is not of Native American descent and not an enrolled member of the Navajo Nation.

2. Akhtar Zaman is the biological father of Sahira Zaman, D.O.B. October 18, 1987; and Barbara Wilson is the biological mother of Sahira Zaman.

3. This court has subject matter jurisdiction and personal jurisdiction of the defendant.

4. The plaintiff-state has incurred costs for HLA blood testing pursuant to the statutes in an amount presently unknown to the court, which costs properly are accessible to be paid by the defendant.

5. The evidence supports the factual information used in the "calculation of child support" chart (Exh. 1) except as such information relates to "annual day care

cost" (line 18) of the chart; and the court finds such costs to be:

1988: $637.00; 1989: $660.00; 1990: $632.00; 1991: $756.00; 1992: $1,129.00; 1993: $1,080.00.

6. The biological mother incurred and expended laying-in expenses in the approximate same amount as the defendant paid to her in December, 1992, i.e. $2,000; and no reimbursement for said expenses is due to Barbara Wilson.

7. The defendant has paid total child support of $300.00 in 1987 and $400.00 per month from December, 1992, through July, 1993; and Barbara Wilson has paid total out-of-pocket medical expenses for Sahira Zaman in the amount of $3,148.00, of which the defendant is responsible for $2,242.00, based upon his average percentage of gross income (Line 21 on Exh 1).

8. The arrearage in child support, including the defendant's share of actual medical expenses paid by the mother is $29,792.00, through July, 1993.

9. The reasonable child support to which Barbara Wilson is entitled from the defendant, Akhtar Zaman, is $600.00 TLW per month beginning August 1, 1993, pursuant to the Arizona Supreme Court guidelines. The mother shall provide and pay for medical, dental and eye care insurance for the child when it is available to her through her employer; and all such expenses not covered by insurance shall be paid by the parties as follows: 72.5% by defendant and 27.5% by the mother.

10. The defendant, Akhtar Zaman, is entitled to reasonable visitation rights with Sahira Zaman pursuant to

the Apache County guidelines, except during a reasonable period of adjustment and establishment of relationship between the father and child. During the period of adjustment and establishment of relationship the visitation shall be as follows unless the parents mutually agree to enlarge such visitation based upon progress in the development of the father-child relationship:

A. During the first six (6) consecutive months in which the father exercises visitation at least one (1) time per month, such visitation shall be for not longer than six (6) hours, shall be within a radius of 25 miles of the child's residence (or the father's residence, if the mother provides the transportation of the child to the community of the father's residence), shall not include any overnight visitation; such visitation may be up to two (2) times per month.

B. Following the foregoing visitation, during the next six (6) consecutive months in which the father exercises visitation at least one (1) time per month, such visitation shall be for not longer than ten (10) hours per day on two (2) days per month or one (1) overnight visit per month with the visit for not longer than thirty (30) hours, and shall be within a radius of 25 miles of the child's residence (or the father's residence, if the mother provides the transportation of the child to the community of the father's residence).

The cost of travel for visitation shall be paid as follows: actual costs of travel – 50% by each parent and all other costs, i.e. meals and housing, if any, by the parent providing the transportation.

11. The parties shall exchange financial information on their income and expenses, including the most recent federal and state income tax returns, at least each 24 – month period.

The court grants judgment to the parties in accordance with the foregoing findings.

DATED THIS 26th day of January, 1994.

/s/ Tom L Wing
Tom L. Wing, Judge
Superior Court Division I

A copy of the foregoing
delivered this 26th
day of January, 1994 to:

John Trebon, P.C.
Attorney at Law
Bank of America Building
121 E. Birch Avenue, Suite 207
Flagstaff, Arizona 86001

Michael Goimarac
Deputy County Attorney
Apache County Attorney's Office
P.O. Box 637
St. Johns, Arizona 85936

/s/ Marcinda Allison
Marcinda Allison
Judicial Secretary

JOHN TREBON, P.C.
Law Offices of John Trebon
308 N. Agassiz
Flagstaff, Arizona 86001
(602) 779-1713

Attorney for Akhtar Zaman
Az. State Bar No. 005375

IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA

IN AND FOR THE COUNTY OF APACHE

THE STATE OF ARIZONA and BARBARA WILSON, Plaintiff and Real Parties in Interest, v. AKHTAR ZAMAN (TAHIRKHAILI), Defendant.	Case No. 8631 NOTICE OF APPEAL (Filed Feb. 11, 1994)

Notice is hereby given that the above named defendant appeals to the Court of Appeals of the State of Arizona from the judgment entered in this action on or about January 26, 1994. Mr. Zaman appeals the entire judgement, including the decision of the Superior Court finding both subject matter jurisdiction and personal jurisdiction over Akhtar Zaman.

DATED THIS 8th day of February, 1994.

/s/ John Trebon
JOHN TREBON
Attorney for Akhtar Zaman,
Defendant

A copy of the foregoing
was mailed this 9th day
of February, 1994, to:

Navajo County Superior Court
P.O. Box 668
Holbrook, Arizona 86025

Mr. Michael Goimarac
Deputy County Attorney
Apache County Attorney's Office
P.O. Box 637
St. Johns, AZ 85936

Mr. Akhtar Zaman
Defendant

By: /s/ L Smith
L. Smith

IN THE FAMILY COURT OF THE NAVAJO NATION JUDICIAL DISTRICT OF WINDOW ROCK, ARIZONA

Barbara Wilson, C#109,131	)	No. WR-FC-271-94
Petitioner	)	**Order Granting Motion to Dismiss**
vs.	)	
Akhtar Zaman (Tahirkhaili)	)	
Respondent.	)	
	)	

This matter of a motion to dismiss having come before the court on October 17, 1994 upon respondent's motion to dismiss for lack of jurisdiction, the court enters as follows:

1. Petitioner filed a petition for enforcement of a paternity and child support decision and order entered in the Navajo County Superior Court of the State of Arizona on January 26, 1994.

2. Petitioner and respondent were involved in a romantic relationship from approximately June 1982 through December, 1986, or possibly June, 1987 while they both resided on the Navajo Indian Reservation.

3. The minor child, Sahira Zaman, was conceived on the Navajo Indian Reservation.

4. At the time paternity was filed, both parties lived continuously on the Navajo Indian Reservation in Window Rock, Arizona and were employed by the Navajo Tribal government. When the child was born in October 18, 1987, petitioner continued to be a resident of Window Rock, Arizona.

5. The Arizona paternity action held that the respondent was the natural and biological father of the minor child, Sahira Zaman, and ordered the respondent to pay the petitioner $600.00 per month for child support. The Order also determined that Mr. Zaman was delinquent in child support owed to the petitioner in the amount of $29,792 (from the date of the child's birth through July 1993.

6. On June 21, 1994, petitioner filed a petition for recognition and enforcement of a foreign judgment seeking to enforce the provisions of the Arizona Order of January 26, 1994. Petitioner seeks to garnish or assign respondent's wages.

7. On October 17, 1994, respondent filed a motion to dismiss alleging that the Arizona court did not have personal jurisdiction over the respondent; that service of process was not properly effected by the Apache County Sheriff; that the Arizona court did not have subject matter jurisdiction; and under comity considerations the family court should not enforce the judgment.

8. A Navajo court will honor and enforce foreign judgments upon consideration of the right of the foreign court to issue the judgment, of the propriety of the proceeding, and of any relevant public policy of the Navajo Nation. *In the Matter of the Guardianship of Catherine Denise Chewiwi*, 1 Nav. R. 120 (1977).

9. To assert personal jurisdiction, due process requires that the person have certain minimum contacts with the forum state so that the maintenance of the action

does not offend notions of fair play and substantial justice. *International Shoe co. v. State of Washington*, 326 U.S. 310 (1945).

10. Consideration must be given to the quality, nature, and extent of the respondent's activity in the state, the relative convenience of the parties, the benefits and protection of state laws afforded to the respective parties, and the basic equities of the case.

11. The record in the Apache County Superior court established that petitioner and respondent met on the Navajo Nation, carried on a romantic relationship on the Navajo Nation, the minor child was conceived on the Navajo Nation. Thus, respondent did not engage in any purposeful or meaningful act outside of the Navajo Nation to subject him to the personal jurisdiction of the state court.

12. Subject matter jurisdiction may be raised at anytime and cannot be waived. A court has authority to determine its own subject matter jurisdiction. A court entering decrees in a matter in which it has no subject matter jurisdiction enters invalid judgments.

13. Title 7 subsection 253(b) of the Navajo Tribal Code provides that the courts of the Navajo Nation shall have original jurisdiction over "all civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation."

14. The family courts have "original exclusive jurisdiction of all cases involving domestic relations, probate, adoption, paternity, custody, child support, guardianship,

mental health commitments, mental and/or physical incompetents name changes and all matters arising under the Children's Code.

15. This paternity action arises from a relationship between petitioner, an enrolled member of the Navajo Nation, and respondent, a non-Indian. At the time of their relationship, both were residents of the Navajo Nation. Their relationship occurred totally within the exterior boundaries of the Navajo Reservation and resulted in the birth of a Navajo child.

16. These facts establish the Arizona court does not have subject matter jurisdiction.

IT IS THEREFORE ORDERED the Court declines to exercise comity due to lack of state court jurisdiction. Respondent's motion to dismiss is hereby granted. Petitioner may file a new complaint and file an original proceeding as a paternity action in the Navajo Nation court. This docket matter is hereby closed with this Court.

SO ORDERED this 22nd day of September, 1995.

/s/ LaVerne Johnson
JUDGE, Navajo Nation
Family Court

STATE of Arizona, Plaintiff-Appellee,

v.

Akhtar ZAMAN (TAHIRKHAILI), Defendant-Appellant.

No. 1 CA-CV 94-0259.

Court of Appeals of Arizona, Division 1, Department B.

March 11, 1996.

As Amended May 1, 1996.

Reconsideration Denied May 3, 1996.

Review Granted Nov. 19, 1996.

State filed paternity action on behalf of mother, who was enrolled member of Navajo Nation, against non-Indian putative father of child residing with mother within boundaries of Nation. The Superior Court, Apache County, Thomas L. Wing, J., determined paternity and entered order for current and back child support. Father appealed. The Court of Appeals, Ehrlich, J., held that state court lacked subject matter jurisdiction over paternity proceeding.

Reversed.

Stephen G. Udall, Apache County Attorney by Michael Goimarac, Assistant County Attorney, St. Johns, for Plaintiff-Appellee.

John Trebon, Flagstaff, for Defendant-Appellant.

OPINION

EHRLICH, Judge.

Akhtar Zaman challenges the subject-matter jurisdiction of the Apache County Superior Court over a paternity suit involving a non-Native-American father and a Native-American mother, both of whom resided within the Navajo Nation when all pertinent events occurred. He also argues that service of process, which was effected on him within the Nation by an Apache County deputy sheriff, acting without authority from the Nation, was invalid.

The superior court ruled that it had subject-matter jurisdiction and that the service was proper. We reverse and hold that the superior court did not have subject-matter jurisdiction. So holding, we do not address Zaman's other argument.

FACTS AND PROCEDURAL HISTORY

Barbara Wilson is an enrolled member of the Navajo Nation, living and working, at all relevant times, in Window Rock, Arizona, which lies within the Nation's boundaries. Zaman is not a Native American; he too lived in Window Rock during all times pertinent to this case.

Beginning in 1982, Zaman and Wilson began a romantic relationship which continued until some time in 1987. For the most part, the relationship was carried on in Window Rock, although they sometimes met in Gallup, New Mexico (which is not within the Nation), and once they met in Albuquerque. However, Zaman and Wilson never were together in Arizona unless it was within the

boundaries of the Nation. In January 1987, in Window Rock, they conceived a child, Sahira Zaman, who was born on October 18, 1987, in Gallup. Following her birth, Sahira lived with Wilson in Window Rock. Sahira is eligible to be enrolled as a member of the Navajo Nation.

On September 15, 1988, the state filed this action. It sought to have Zaman adjudged as Sahira's father, to order him to pay child support and certain medical expenses, to grant Wilson custody and to grant Zaman reasonable visitation.[1]

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[1] The complaint alleged that the state was acting pursuant to the following statutes:

> Proceedings to establish the maternity or paternity of a child or children and to compel support under this article may be commenced by any of the following:
>
> 1. The mother.
>
> 5. The state pursuant to § 12-2456.

Ariz.Rev.Stat.Ann. ("A.R.S.") § 12-843(A).

> The attorney general or county attorney on behalf of this state may initiate an action or intervene in an action to establish, modify or enforce a duty of child support, including medical support, regardless of the welfare or nonwelfare status of the person to whom the duty of support is owed. The attorney general or county attorney may establish, modify or enforce such a duty of support by all means available, including all civil and criminal remedies provided by law.

A.R.S. § 12-2456(A).

In paternity proceedings, the superior court's judgment "shall direct the amount which the defendant shall pay for the past care and support of the child," A.R.S. § 12-849(A), may direct the father to "pay for the expenses for the lying-in, support of and attendance upon the mother during her confinement," A.R.S. § 12-849(B), and may order either or both parents "to pay

A summons and complaint were served on Zaman in Window Rock by an Apache County deputy sheriff. Zaman responded with a motion to dismiss, asserting that the superior court lacked subject-matter jurisdiction and that the service of process was improper. The court denied the motion without explanation. Zaman then filed a motion for reconsideration, which the court denied.

Almost 2.5 years later, Zaman filed a motion for summary judgment, again raising the issues of subject-matter jurisdiction and service. Again, the court denied the motion and the matter was tried on July 28, 1993.

On January 28, 1994, the superior court determined Zaman to be Sahira's biological father and that he was $29,792 in arrears in child support, set monthly support at $600, gave Wilson custody and established visitation guidelines.[2] Zaman appealed.

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any monies reasonable and necessary for the support of the child." A.R.S. § 12-849(C).

In cases when paternity has been established, any party *except the state* may request custody and visitation orders, and the attorney general and county attorney are prohibited from seeking or defending any such ancillary matters. A.R.S. §§ 12-843(B), 12-2456(C). However, Zaman has not challenged the judgment on this basis.

[2] Zaman filed with this court as "supplemental authority" an order of the Navajo Family Court refusing Wilson's petition to enforce the judgment obtained by the state because the state court lacked subject-matter jurisdiction. *Wilson v. Zaman*, No. WR-FC-271-94, Order Granting Motion to Dismiss (Nav.Fam.Ct. Sept. 22, 1995). While this order does not qualify as precedential authority, *see* Rule 28(c), Ariz.R.Civ.App.P.; *Kriz v. Buckeye Petroleum Co.*, 145 Ariz. 374, 377 n. 3, 701 P.2d 1182, 1185 n. 3 (1985) (memorandum decisions from other courts may not be

DISCUSSION

State courts are precluded from acting on matters involving Native Americans in two situations: (1) when "state action [would] infring[e] on the right of reservation Indians to make their own laws and be ruled by them" and (2) when the federal government has preempted state authority. *Smith Plumbing Co., Inc. v. Aetna Casualty & Sur. Co.*, 149 Ariz. 524, 529, 720 P.2d 499, 504 (*quoting Williams v. Lee*, 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959), and *citing Ramah Navajo Sch. Bd. v. Bureau of Revenue*, 458 U.S. 832, 837, 102 S.Ct. 3394, 3398, 73 L.Ed.2d 1174 (1982), and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980)), *cert denied*, 479 U.S. 987, 107 S.Ct. 578, 93 L.Ed.2d 581 (1986). Zaman argues both points: that this action infringes on the right of the Navajo Nation to make and live by its own laws, and that federal statutory law precludes the state court from taking jurisdiction in this case. Agreeing with the first contention, we do not address Zaman's statutory argument.

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's History." *Rice v. Olson*, 324 U.S. 786, 789, 65 S.Ct. 989, 991, 89 L.Ed. 1367 (1945); *see generally* Felix Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1982). Indian reservations traditionally have been considered "distinct political communities, having territorial boundaries, within which

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cited), it does support our determination regarding jurisdiction in this matter.

their authority is exclusive . . . which is not only acknowledged, but guarantied [sic] by the United States." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557, 8 L.Ed. 483 (1832). *See Begay v. Roberts*, 167 Ariz. 375, 378, 807 P.2d 1111, 1114 (App.1990). Under the Indian sovereignty doctrine, only the federal government was empowered with jurisdiction over dealings with Indian nations, even though the Indian lands fell within the geographical boundaries of individual states. *Id.* The laws of the surrounding states, therefore, had no force on the reservations, and citizens of these states were not authorized to enter the reservations or assert authority over them without the assent of the Native Americans themselves and in accordance with the treaties and acts of Congress. *Id.*

> They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as states, not as nations, not as possessed of the full attributes of sovereignty, but as a *separate people, with the power of regulating their internal and social relations*, and thus far not brought under the laws of the Union or of the State within whose limits they resided.

United States v. Kagama, 118 U.S. 375, 381-82, 6 S.Ct. 1109, 1112-13, 30 L.Ed. 228 (1886) (emphasis added).

In 1868, the United States signed a treaty with the Navajo Nation which set aside land in Arizona, New Mexico and Utah for the "exclusive use and occupation of" the Navajos in return for a promise to maintain peace. 15 Stat. 667 (1868). The treaty guaranteed that only authorized agents of the United States government would be permitted within the reserved land. By limiting intrusion

on the reservation in this manner, the treaty implicitly provided that "the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." *Williams*, 358 U.S. at 221-22, 79 S.Ct. at 271.

Congress has acted consistently with the principle that the states lack jurisdiction over Native Americans living on reserved lands absent an Act of Congress permitting such jurisdiction. When Arizona became a state, 36 Stat. 557, 568-79 (1910), its entry into the Union was expressly conditioned upon its adoption of a constitutional provision disclaiming right and title to reservation lands. *See* Ariz. Const. art. 20, sec. 4. However, Congress later provided the states with a means to assume jurisdiction over the reservations. Public Law 280, enacted in 1953, delegated jurisdiction to several states and permitted other states, such as Arizona, to disregard the constitutional language mandated by their enabling acts and assert by legislation jurisdiction over reservation lands falling within the states' borders.[3] Fifteen years later, Congress passed the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.*, which in part modified Public Law 280 by requiring states wishing to assume jurisdiction over Indian lands to first secure the affected tribes' consent. 25 U.S.C. §§ 1321, 1322. Desirous states must also amend their constitutions and/or statutes to reflect their

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[3] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588, *codified as amended* at 18 U.S.C. § 1162 (1984), 25 U.S.C. §§ 1321-1326 (1983), and 28 U.S.C. § 1360 (1993). It retains its familiar designation as "Public Law 280."

assumption of jurisdiction. 25 U.S.C. § 1324. While several states did assume complete jurisdiction, Arizona, generally, did not. *See Tohono O'odham* [sic] *Nation v. Schwartz*, 837 F.Supp. 1024, 1029 (D.Ariz.1993); *Nenna v. Moreno*, 132 Ariz. 565, 566, 647 P.2d 1163, 1164 (App.1982).[4] Absent such implementation, the states have no jurisdiction over Native Americans on Indian reservations. *E.g., McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 177-79, 93 S.Ct. 1257, 1265-66, 36 L.Ed.2d 129 (1973); *Kennerly v. District Court of the Ninth Judicial District of Montana*, 400 U.S. 423, 427-30, 91 S.Ct. 480, 482-84, 27 L.Ed.2d 507 (1971).

This court has said:

> The Navajo Treaty of 1868 first set forth the concept of the Navajo Tribe as a sovereign entity and that, within the reservation, it possesses the right of self-government. *See Joe v. Marcum*, 621 F.2d 358, 361 (10th Cir.1980). The Navajo Tribe has accordingly created a system of self-government, including a judicial branch consisting of trial and appellate courts, and has enacted the Navajo Tribal Code. *Id.* The Navajo Treaty has been consistently interpreted to preclude state court jurisdiction over Navajos living on the reservation. *McClanahan v. State Tax Comm'n*, 411 U.S. at 175, 93 S.Ct. at 1264.

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[4] In at least two instances, resolutions to this effect introduced in the Arizona Senate were not passed. S.C.R. 9, 24th Legislature, 1st Reg.Sess. (1959); S.C.R. 9, 23rd Legislature, 2d Reg.Sess. (1958). One exception is the enforcement of air pollution control laws. A.R.S. § 49-561. Another exception was water pollution but that statute was repealed. *See* former A.R.S. § 36-1865.

Begay v. Roberts, 167 Ariz. 375, 379, 807 P.2d 1111, 1115 (App.1990). Additionally, "tribal courts have inherent power to adjudicate civil disputes affecting the interests of Indians and non-Indians which are based upon events occurring on the reservation." *Smith Plumbing Co.*, 149 Ariz. at 529, 720 P.2d at 504 (*quoting A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1415-16 (9th Cir.), *cert. denied*, 476 U.S. 1117, 106 S.Ct. 2008, 90 L.Ed.2d 659 (1986)). Thus, we must determine whether the state's attempt to establish Zaman's paternity of Sahira and to obtain back child support infringes on the Navajo Nation's right to make and live by its own laws. We conclude that it does.

In *Williams*, the Supreme Court held that Arizona courts lacked jurisdiction over a contract claim by a non-Native American against a Navajo couple when the cause of action arose within the Navajo Nation. The plaintiff ran a general store on the reservation where the defendants bought goods on credit. When the defendants failed to pay, the plaintiff filed suit in the state superior court. Reversing the state court's judgment against the defendants, the Supreme Court stated:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the

> Navajos in the Treaty of 1868, and has done so ever since. If this power is to be taken away from them, it is for Congress to do it.

358 U.S. at 223, 79 S.Ct. at 272 (citations omitted).

If the determination of a contract matter involves the authority of tribal courts over reservation affairs, then so must the determination of a more intimate domestic-relations matter. The Navajo Supreme Court justifiably has called domestic-relations the "core of the tribe's 'internal and social relations.'" *Billie v. Abbott*, ___ Nav.Rptr. ___, ___, 16 Indian L.Rep. 6021, 6022 (Navajo 1988). In *Billie*, an enrolled Navajo resident within the Nation sought to prevent a Utah state official from intercepting his federal income tax refund to reimburse the state for money paid to the mother of Billie's child under the Aid to Families with Dependent Children ("AFDC") program. The Navajo Supreme Court held that the state official's act infringed on Navajo self-government:

> The Navajo Nation's exclusive power to regulate domestic relations among Navajos living within its borders is beyond doubt. The Navajo Nation has codified law and case law regulating Navajo domestic relations. And the Navajo Nation's right to make its own laws and be ruled by them is an established principle in Indian law. *Williams v. Lee*, 358 U.S. 217 [79 S.Ct. 269, 3 L.Ed.2d 251] (1959); *United States v. Wheeler*, 435 U.S. 313 [98 S.Ct. 1079, 55 L.Ed.2d 303] (1978). Accordingly, absent explicit congressional authorization, if a state infringes on the right of reservation Indians to make their own laws and be governed by them, that state has acted outside its authority. *See Williams v. Lee*, 358 U.S. at 220-223 [,79 S.Ct. at 270-272];

> *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 173 [93 S.Ct. 1257, 1262-1263, 36 L.Ed.2d 129] (1973). The AFDC legislation does not explicitly authorize Utah to decide tribal domestic relations, thus, Utah's determination of Billie's support obligation is an unlawful interference with Billie's right to be regulated by Navajo law.

Id. at ___, 16 Indian L.Rep. at 6022-23. The Navajo courts have jurisdiction to determine maternity and paternity matters. *Descheenie v. Mariano*, ___ Nav.Rptr. ___, 15 Indian L.Rep. 6039 (Navajo 1988).[5]

The North Carolina Supreme Court has reached the same conclusion.

> The determination of the paternity of an Indian child is of special interest to tribal self-governance, the right of reservation Indians to make their own laws and be governed by them. Such determination strikes at the essence of the tribe's internal and social relations.

Jackson County by and through Child Support Enforcement Agency ex rel. Jackson v. Swayney, 319 N.C. 52, 352

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[5] The court in *Descheenie* said that "[t]he Navajo Tribal Code does not contain provisions on paternity actions or how to determine child support amounts. We realize that we are treading on legislative ground by setting up these guidelines." *Id.* at ___, 15 Ind.L.Rep. at 6039. Based on this statement, the state argues that *Descheenie* was wrongly decided and urges us to hold that the lack of legislative action means that the Navajo courts lack jurisdiction over such matters. This we will not do. This court does not sit in review of the Navajo Supreme Court and it is not for us to reject an interpretation of Navajo law by its highest court.

S.E.2d 413, 418-19 (N.C.), *cert. denied*, 484 U.S. 826, 108 S.Ct. 93, 98 L.Ed.2d 54 (1987) (footnote omitted).

On the facts of this case, the jurisdiction of the Navajo courts over the paternity action is exclusive.

> Within Indian country . . . [s]tate jurisdiction is precluded even over what are commonly designated as transitory causes of action. . . . Most reported cases have involved normally transitory claims or were domestic relations cases, which often have ties to more than one jurisdiction. The holdings in these cases preclude concurrent state court jurisdiction over events within Indian country. . . . However, state courts usually have jurisdiction over Indians where the cause of action or some material event occurs outside Indian country.

Cohen, HANDBOOK OF FEDERAL INDIAN LAW, p. 349 n. 13. *See Fisher v. District Court*, 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976) (tribal court had jurisdiction, exclusive of state court, over adoption proceeding when all parties Indians residing on reservation).

It is true that *Descheenie* and *Swayney* are factually distinguishable from this case; in both of them all parties involved were Native Americans, whereas Zaman is not a Native American. We do not find this difference sufficient to change the result, however. A paternity action involves three parties: the mother, the father and the child. The emphasis is on the child because the ultimate intent of paternity and support actions is to obtain what is best for the child. In this case, the child is Navajo and she resided with her mother within the Nation during all relevant periods. Furthermore, the vast majority of Zaman's and

Wilson's relationship took place within the Navajo Nation; no pertinent event occurred in Arizona other than there. Thus, at its core, this litigation involves two Navajos residing within their Nation and a non-Navajo who moved to the Nation, subjecting himself to Navajo law. As the Supreme Court stated in *Williams*, "[i]t is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." 358 U.S. at 223, 79 S.Ct. at 272.

The state responds with two cases in support of its contention that the state-court action does not infringe on the Navajo Nation's sovereignty. The first is *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138, 104 S.Ct. 2267, 81 L.Ed.2d 113 (1984). There, the tribal government brought a state-court action against a non-Indian contractor for deficiencies in its work installing a water-supply system on the reservation. The Supreme Court held that the state court had jurisdiction over the matter, saying that, "[a]s a general matter, tribal self-government is not impeded when a State allows an Indian to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country." *Id.* at 148-49, 104 S.Ct. at 2267. The state relies on *Three Affiliated Tribes* to argue that Wilson chose to bring this action in state court. We disagree.

First, Wilson did not bring this action, although it was she who approached the Apache County Attorney, and she is not a party. The state filed the complaint and prosecuted it to judgment, notwithstanding that Wilson appears to be the "real party in interest" because she is entitled to the benefits of the judgment and arguably could have joined in the action. *Cf.* A.R.S. § 12-2456(A)

(state may intervene in a paternity action). Nonetheless, she never was a party; she was not listed as a plaintiff and did not verify the complaint. Her only appearance in the case was as a witness. *Cf. Chalpin v. Mobile Gardens, Inc.*, 18 Ariz.App. 231, 234-35, 501 P.2d 407, 410-11 (1972) ("party" is one who is directly interested in the subject matter of a suit and who has the right to appear and contest matters in litigation; the right arises in the plaintiff by submitting herself to the jurisdiction of the court by filing the complaint and arises in the defendant by being served with process). Wilson did not choose the forum; the State of Arizona did.

Furthermore, in *Three Affiliated Tribes* the tribal laws did not provide the tribal court with jurisdiction over the cause of action and the plaintiff was the tribe itself, not an individual member thereof. The Supreme Court relied on those facts in affirming state-court jurisdiction: "The exercise of state jurisdiction is particularly compatible with tribal autonomy when, as here, the suit is brought by the tribe itself and the tribal court lacked jurisdiction over the claim at the time the suit was instituted." 467 U.S. at 149, 104 S.Ct. at 2269. Here, the Navajo Supreme Court has specifically held that the Navajo courts have jurisdiction over paternity actions. *Three Affiliated Tribes* does not support the state's position.

The state also relies on *New Mexico ex rel. Dep't of Human Services v. Jojola*, 99 N.M. 500, 660 P.2d 590, *appeal dismissed, cert. denied*, 464 U.S. 803, 104 S.Ct. 49, 78 L.Ed.2d 69 (1983). In that case, the state filed a paternity action against the putative father in a state court, despite the fact that the defendant, the mother and the child were all Isleta Indians, and the relationship between the

mother and putative father took place on the reservation. The mother had applied for and received public assistance, and assigned to the state her right to child support in accordance with 42 U.S.C. § 602(a). The New Mexico Supreme Court held that the state-court action did not infringe on the right of the Isleta Indians to make their own laws and be ruled by them. It reasoned that the action was among a non-Indian, the state and the Indian defendant, and that the cause of action arose outside the reservation when the mother obtained public assistance and assigned to the state her right to support. The court noted that there were competing interests to serve: the tribe's right to regulate its domestic affairs and the state's right to obtain, from a parent who owes a duty of support, reimbursement for the public assistance it pays to the custodial parent. The court held paramount the state's interest:

> In New Mexico, there are twenty-three separate Indian jurisdictions which may have different statutes and rules. To require the State of New Mexico to proceed to the various tribal courts of the State would defeat and be a burden on the aims of the public assistance program. Therefore, we find no interference with tribal self-government as long as DHS does not assert jurisdiction within the reservation.
>
> 660 P.2d at 593.

Several reasons favor not applying *Jojola*. First, its holding is questionable. In essence, the court held that the burden on the state to utilize the tribal courts to establish paternity meant that there was no interference with tribal self-government if the state utilized state

courts. This is illogical. The North Carolina Supreme Court has aptly criticized *Jojola*:

> [W]e are not persuaded by the New Mexico court's reliance on the fact that the cause of action arose outside of the reservation when the mother filed and obtained public assistance and assigned her support rights to DHS. The foundation for the cause of action in both *Jojola* and the case *sub judice* is the determination of parentage; for unless defendant is the father of the child, there is no basis for requiring him to pay child support or reimburse the State for payments made by it. . . .
>
> . . . The determination of the paternity of an Indian child is of special interest to tribal self-governance, the right of reservation Indians to make their own laws and be governed by them. Such determination strikes at the essence of the tribe's internal and social relations. Thus, exclusive tribal court jurisdiction over the determination of paternity, where the defendant is an Indian living on the reservation, is especially important to tribal self-governance. The State's interest in having this matter litigated in its own courts is less compelling. . . . [T]he State may resort to the Court of Indian Offenses to secure a judgment or order determining the paternity of the child,. . . .

Swayney, 352 S.E.2d at 418-19 (footnote omitted).

The Navajo Supreme Court has also criticized *Jojola* for its failure to recognize the Nation's interests:

> Navajo statutes and case law reflect Navajo culture and the unique circumstances and needs of the Navajo people living on the reservation.

> State determinations of tribal domestic relations, no matter how narrow the intrusion, is [sic] always hostile to and in conflict with the needs of the Indian people. For this very reason we disagree with the decision in *New Mexico v. Jojola*,. . . . There, the Court clearly ignored an Indian tribe's right to regulate its internal relations.
>
> A further danger is that state decisions on Navajo domestic relations may cause a decline in Navajo court authority over Navajos and over Navajo domestic relations. . . . Utah's decision on Billie's support obligation would not only adversely affect Navajo authority over internal tribal matters, but it may encourage Navajos to go directly to Utah in hopes of receiving a larger award. State interference would indeed hinder the development of Navajo domestic relations law. There is clearly infringement upon Navajo self-government when a state official decides the child support payments of Navajos living on the reservation.

Billie, ___ Nav.Rptr. at ___, 16 Indian L.Rep. at 6023 (citations omitted). The same threat to sovereignty would be created here were we to hold that the Arizona court has jurisdiction.

The court in *Billie* agreed that the state may seek a paternity determination from the tribal court in order to obtain a judgment against the delinquent parent:

> Utah and the Navajo Nation, no doubt, can cooperate so that the AFDC legislation is implemented in a way that benefits Navajos living on the reservation without violating the federal purpose. The AFDC legislation is flexible

> enough so that [the state official] can come to Navajo courts to adjudicate the support amount, or Utah can require Navajo applicants to go first to Navajo courts for support decisions. In this case the Navajo court had continuing jurisdiction over Billie's support obligation, and Utah, which had no jurisdiction, should have required [the mother] to return to the Navajo court.

Id. at ___, 16 Indian L.Rep. at 6023. *Swayney* and *Billie* stand for the well-established principle that, absent express tribal or congressional action to the contrary, tribes retain a preeminent interest and role in governing the domestic relations of their members. The Navajo Nation's interest in this case includes Wilson and Sahira, and Zaman who, in coming onto the reservation, subjected himself to Navajo law.

Even accepting the New Mexico court's holding in *Jojola* does not help the state. For all that appears in this record, the state was not pursuing its own interests in prosecuting this case but was simply acting on Wilson's behalf. The only monetary relief requested was current and back child support for Wilson; no reimbursement to the state was sought as was the case in *Jojola*.

The state "may not exercise subject matter jurisdiction over transactions arising on Indian reservations unless the transaction entails 'significant' or 'substantial' contacts with the state outside reservation boundaries." *Navajo Nation v. MacDonald*, 180 Ariz. 539, 545-46, 885 P.2d 1104, 1110-11 (App.1994) (*quoting Montana ex rel. Flammond v. Flammond*, 190 Mont. 350, 621 P.2d 471, 472 (1980) (emphasis added in *Navajo Nation*). In this case, there are no contacts with the state outside the Navajo

Nation's boundaries. Consequently, the state court may not exercise subject-matter jurisdiction.[6]

CONCLUSION

Because the superior court lacked subject-matter jurisdiction over this paternity proceeding, the judgment is reversed.

GRANT, P.J., and NOYES, J., concur.

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[6] Because of our holding, we need not reach Zaman's argument that to allow the state court to decide this matter would be in violation of constitutional equal protection. We quote, however, the following language of the United States Supreme Court:

> Finally, we reject the argument that denying the Runsaboves access to the Montana courts constitutes impermissible racial discrimination. The exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law. Moreover, even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government.

Fisher, 424 U.S. at 390-91, 96 S.Ct. at 948 (citation omitted).

SC-CV-44-95

SUPREME COURT OF THE NAVAJO NATION

Barbara Wilson, Appellant,

v.

Akhtar Zaman, Appellee.

ORDER

Before AUSTIN, Acting Chief Justice, and CADMAN, Associate Justice.

Appeal from Window Rock Family Court, No. WR-FC-271-94, the Honorable LaVerne Johnson presiding.

Barbara Wilson, *Pro se* Appellant, Tempe, Arizona.

The Court has reviewed the appellate and trial court records in this case and it finds as follows:

1) There is probable cause to grant the appeal. The appeal will be decided on the record considering that there is no response from Appellee. The Court is aware that the Appellant requested oral argument; however, oral argument is not needed to decide this appeal.

2) The family court's order correctly sets forth the Navajo law on recognition of foreign judgments in the Navajo Nation courts. In this case, the Arizona court did not have subject matter jurisdiction over the paternity action; therefore, its judgment over that matter is invalid. See *State of Arizona v. Akhtar Zaman*, No. 1 CA-CV-94-0259, Ariz. Ct. of App. Div I, March 11, 1996. A foreign court that enters judgment over an action in which it has no subject matter jurisdiction enters an

invalid judgment. That judgment cannot be recognized and enforced in the Navajo Nation courts. The paternity judgment that the Appellant is attempting to have recognized by the family court is one of those.

3) The Appellant will have to file an action for paternity in the family court and then seek to introduce some of the evidence she gathered for the state court proceeding. Admission of that evidence is within the authority of the family court.

It is therefore ORDERED that the appeal is granted. It is further ORDERED that the decision of the Window Rock Family Court is AFFIRMED.

Filed this 29th day of October, 1996.

/s/ Raymond D. Austin
Acting Chief Justice of the
Navajo Nation

/s/ Wayne A. Cadman
Associate Justice

IN THE SUPREME COURT
OF THE STATE OF ARIZONA
En Banc

STATE of Arizona, Plaintiff-Appellee.

v.

Akhtar ZAMAN (Tahirkhaili) Defendant-Appellant.

No. CV-96-0328-PR.

FILED: 10/09/97

Court of Appeals No. 1-CA-CV 94-0259; Apache County No. CV 8631

Appeal from the Superior Court of Arizona in Apache County, The Honorable Thomas L. Wing, Judge, Opinion of the Court of Appeals, Division One, 187 Ariz. 81, 927 P.2d 347 App. 1996

VACATED AND REMANDED

ATTORNEYS:

Stephen G. Udall, Apache County Attorney St. Johns, By Karl C. Eppich, Deputy County Attorney, Attorneys for the State of Arizona

Trebon & Fine P.C. Flagstaff, By John J. Trebon, Attorneys for Akhtar Zaman (Tahirkhaili)

MARTONE, Justice.

The issue before us is whether a state court has subject matter jurisdiction in an action brought by the State of Arizona, at the request of a member of an Indian

tribe, against a non-member, non-Indian father, to determine paternity, custody, and child support obligations involving a child eligible for tribal membership. We hold that the state court has subject matter jurisdiction.

I. Facts

Barbara Wilson is an enrolled member of the Navajo Tribe. Akhtar Zaman is neither a member nor an Indian. Both parties lived and worked on the Navajo Reservation.

Wilson and Zaman were involved in a romantic relationship from 1982 until 1987. Sahira Zaman was born on October 19, 1987, and, though eligible for membership in the Navajo Tribe, is not a member.

At Wilson's request, the State of Arizona filed an action in superior court to have Zaman adjudged Sahira's father, to order him to pay child support, and to grant Wilson custody.[1] Zaman moved to dismiss for lack of subject matter and personal jurisdiction, and improper service of process. The court denied the motion. Several

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[1] The State brought this action pursuant to 42 U.S.C. §654 (1994), A.R.S. §§12-841 to -852 (1992) (current version at A.R.S. §§25-801 to -815 (Supp.1996)), and A.R.S. §§12-2451 to -2462 (1994) (current version at A.R.S. §§25-501 to -517 (Supp.1996)). The State is authorized to bring actions to establish paternity and compel child support. The State "shall not seek or defend any ancillary matters such as custody or visitation." A.R.S. §12-843(B) (1992) (current version at A.R.S. §25-803(B) (Supp.1996)); *see also* §12-2456(C) (1994) (current version at A.R.S. §25-509(C) (Supp.1996)). Zaman did not challenge the State's involvement in the custody and visitation portions of this action.

years later, Zaman filed a motion for summary judgment on the same issues. The court again denied the motion.

The court found that Zaman was Sahira's father, that he owed $29,792 in back child support, and set child support at $600 per month. It granted Wilson custody and established guidelines for visitation.

The court of appeals reversed, and held that the superior court lacked subject matter jurisdiction because "state action [would] infring[e] on the right of reservation Indians to make their own laws and be ruled by them." *State v. Zaman*, 187 Ariz. 81, 83-84, 927 P.2d 347, 349-50 (App. 1996). Believing that an important issue of law had been decided incorrectly, we granted review. Rule 23(c)(4), Ariz. R. Civ. App. P.

II. Analysis

The State of Arizona, a non-Indian party, brought this action against Zaman, also a non-Indian. Jurisdiction over an action between two non-Indian parties presumptively lies in state court.

On the other hand, Wilson, the real party in interest, is a member of the Navajo Tribe. Sahira, the child who is at the heart of this matter, although a non-member, is eligible for membership in the Navajo Tribe. The relationships arose on the Navajo reservation.

A. The infringement test

Absent an act of Congress, state court jurisdiction over litigation involving Indians and non-Indians for transactions arising on the reservation depends on

"whether the state action infringe[s] on the right of reservation Indians to make their own laws and be ruled by them." *Fisher v. District Court*, 424 U.S. 382, 386, 96 S. Ct. 943, 946 (1976) (quoting *Williams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269 (1959)). Zaman has not argued that federal preemption acts as a barrier to state court jurisdiction over non-Indians, and we have found no authority to support such a proposition.[2] Thus, state court jurisdiction exists unless the action would unduly infringe on Indian self-governance.

The infringement test originated in *Williams v. Lee* from an attempt by a non-Indian to sue Indians in state court for on-reservation conduct. The right of the Indian defendants to be governed by their tribe's laws prevented the non-Indian plaintiff from suing them in state court. In the four decades following *Williams*, only in actions "by non-Indians against Indians or . . . between Indians . . . [has state court jurisdiction been found to] intrude[ ] impermissibly on tribal self-governance." *Three Affiliated Tribes v. Wold Eng'g (Wold I)*, 467 U.S. 138, 148, 104 S. Ct. 2267, 2274 (1984). The application of the

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[2] Preemption as a bar to state court jurisdiction was neither raised in the Petition for Review nor in the Response. The issue was not raised in the briefs in the court of appeals. Rather, Zaman acknowledged in his opening brief that neither 25 U.S.C. §1911 (1994) nor 25 C.F.R. §§11.22 and 11.30 (1988) resulted in federal preemption. There is no comprehensive regulatory scheme governing child support, paternity, and custody, outside of the adoption and foster care context, that would indicate an intent by Congress to oust the state court of jurisdiction over these issues. If Zaman intended to raise preemption as a barrier to state court jurisdiction, we reject that contention.

infringement test in the adjudicatory setting has protected *Indian defendants* from nonconsensual state court jurisdiction. *See, e.g., Williams*, 358 U.S. at 219-20, 79 S. Ct. at 270-71; *Fisher*, 424 U.S. at 386, 96 S. Ct. at 946.

Zaman's challenge to state court jurisdiction presents us with the obverse of the ordinary claim structure. Zaman, a non-Indian, seeks to use a protection afforded Indians to defeat the claim of an Indian who chooses the state forum. This attempt to clothe oneself in the immunity afforded another has already been rejected by the Supreme Court. *Wold I*, 467 U.S. at 148, 104 S. Ct. at 2274.

The Indian interests which the infringement test seeks to protect are not present when an Indian plaintiff brings an action against a non-Indian defendant in state court. So long as the Indian party selects the state forum, there is nothing for the infringement test to protect against. Thus, the Supreme Court "repeatedly has approved the exercise of jurisdiction by state courts over claims by Indians against non-Indians, even when those claims [arise] in Indian country." *Id.*

The infringement test protects Indians. It is not an offensive tool to be used against them. Thus, the infringement test will not preclude state court jurisdiction where an Indian plaintiff brings an action against a non-Indian defendant. *See id.* at 148-49, 104 S. Ct. at 2274.

Zaman argues that *Wold I* should be limited to cases in which the tribe itself brings the action. But *Wold I* is not so limited: "self-government is not impeded when a State allows an *Indian* to enter its courts on equal terms with other persons to seek relief against a non-Indian concerning a claim arising in Indian country." *Id.*

(emphasis added). We do not read the Court's acknowledgment that state court jurisdiction is "particularly compatible with tribal autonomy" when the tribe itself is the plaintiff as a limitation on the Court's general holding. *Id.* at 149, 104 S. Ct. at 2274. Nor has Zaman cited any authority for his contention. Our own research revealed only one case involving a non-Indian's challenge, and it concluded that state court jurisdiction existed. *Brooks v. Nance*, 801 F.2d 1237, 1239-40 (10th Cir. 1986).

Zaman also argues that the infringement test seeks to protect the collective interests of the tribe, not the interests of individual tribal members. Thus, he argues, where the tribe itself is the plaintiff, there would be no infringement of tribal interests, but where a tribal member is the plaintiff, state court jurisdiction would not exist if the tribe had a sufficient interest in the litigation. We disagree.

We are unaware of any Supreme Court case that has considered the collective interests of the tribe, in contrast to an Indian's rights, in determining the adjudicatory authority of state courts under the infringement test. "Tribal interests" have been used as a backdrop for the interpretation of federal law in preemption cases, *Three Affiliated Tribes v. Wold Eng'g (Wold II)*, 476 U.S. 877, 884, 106 S. Ct. 2305, 2310 (1986), and in regulatory actions concerning tribal enterprises and government programs, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145, 100 S. Ct. 2578, 2584 (1980). But in actions involving the rights and interests of individual Indians, the relevant inquiry is the infringement of individual rights.

> To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights. This Court has therefore held that "the question has always been whether the state action infringed on the right of *reservation Indians* to make their own laws and be ruled by them."

McClanahan v. State Tax Comm'n, 411 U.S. 164, 181, 93 S. Ct. 1257, 1267 (1973) (quoting *Williams*, 358 U.S. at 220, 79 S. Ct. at 271). The adjudicatory authority of state courts in matters involving an Indian party depends upon the Indian party's interest, not on the interests of the tribe as a whole.

Congress may, of course, enact legislation to protect the collective interests of the tribe. It has done so with the Indian Child Welfare Act (ICWA). 25 U.S.C. §§1901-1963 (1994). "[T]he rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society" caused Congress to provide exclusive tribal court jurisdiction over certain child welfare actions. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 37, 109 S. Ct. 1597, 1602 (1989) (quoting H.R. Rep. No. 95-1386, at 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546). But Congress limited such actions to proceedings resulting in the termination of the Indian parent's rights. 25 U.S.C. §§1903, 1911. Child placement proceedings in divorce actions in which custody is awarded to one of the parents were explicitly removed from the reach of the ICWA. 25 U.S.C. §1903(1).

The ICWA was enacted to prevent the "wholesale removal" of Indian children from their families and their tribes through adoption and foster care placement, usually with placement in non-Indian homes. *Holyfield*, 490 U.S. at 32-37, 109 S. Ct. at 1599-1602. But the child custody proceeding at issue here does not raise the same concerns. There is no threat that Sahira will not be exposed to her Indian heritage. Thus, although the ICWA is inapplicable, even its rationale would not support Zaman's contention.

State court jurisdiction over actions brought by Indians against non-Indians does not infringe upon the rights of Indians to make their own laws and to be ruled by them. *Wold I*, 467 U.S. at 148, 104 S. Ct. at 2274. But Indian rights would be infringed if we permitted a non-Indian to challenge an Indian's choice of the state forum. Members of tribes are citizens of the United States and of the state in which they reside and thus have the right to bring actions in state court. *McClanahan*, 411 U.S. at 172-73, 93 S. Ct. at 1262. This right would be substantially hindered if non-Indians could prevent Indians from seeking redress in state court.

Zaman argues that *Fisher v. District Court*, 424 U.S. 382, 390-91, 96 S. Ct. 943, 948 (1976), permits the denial of an Indian's right to bring an action in state court. But *Fisher* merely limits a tribal member's right to bring an action in state court when the action is against another tribal member. That part of *Fisher* upon which Zaman relies does nothing more than acknowledge that state courts, absent a governing act of Congress, are generally without jurisdiction over tribal member defendants for on-reservation activities. If an Indian's right to bring an

action in state court is to be meaningful, we must respect the Indian plaintiff's choice of forum when no Indian is subjected to state court jurisdiction without consent.

Zaman is a non-Indian. He is not entitled to the protections afforded Indian defendants. Nor can we perceive of any threat to Indian self-governance by requiring a non-Indian to answer the complaint of an Indian in state court. The state court had subject matter jurisdiction over this action.

B. Exclusive or concurrent jurisdiction

Zaman argues that if the state court has jurisdiction, there is concurrent jurisdiction in the Navajo courts, and the state court should have exercised judicial restraint. But this argument assumes that the Navajo courts have jurisdiction, an uncertain proposition at best.

Zaman contends that tribal courts have civil jurisdiction over the on-reservation activities of non-Indians "unless affirmatively limited by a specific treaty provision or federal statute." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18, 107 S. Ct. 971, 977 (1987). A unanimous Supreme Court, however, recently rejected the argument that *LaPlante* provides tribes with broad jurisdiction over non-Indians for on-reservation conduct. *Strate v. A-1 Contractors*, ___ U.S. ___, ___, 117 S. Ct. 1404, 1412-13 (1997). *LaPlante* describes an exhaustion rule. *Id.* at ___, 117 S. Ct. at 1413. It does not purport to establish tribal court adjudicatory authority. *Montana v. United States*, 450 U.S. 544, 101 S. Ct. 1245 (1981), remains as the "pathmarking case concerning tribal civil authority over nonmembers." *Strate*, ___ U.S. at ___, 117 S. Ct. at 1409.

Montana extended into the civil context the general principle expressed in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011 (1978), that the inherent sovereign authority of tribes does not include the right to exercise jurisdiction over non-Indian defendants. *Montana*, 450 U.S. at 565, 101 S. Ct. at 1258. "[T]he Indian tribes have lost any 'right of governing every person within their limits except themselves.' " *Id.* (quoting *Fletcher v. Peck*, 6 Cranch 87, 147, 3 L.Ed. 162 (1810) (Johnson, J., concurring)). Tribal courts do not have civil jurisdiction over non-members unless one of two exceptions applies. *Montana*, 450 U.S. at 565, 101 S. Ct. at 1258. First, tribal courts may exercise jurisdiction over non-Indians who engage in consensual business relationships with tribes. *Strate*, ___ U.S. at ___, 117 S. Ct. at 1415; *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141, 102 S. Ct. 894, 903 (1982) (affirming a tribe's power to tax non-Indians who conduct business on the reservation). Second, tribal courts have jurisdiction over conduct on fee lands within the reservation if the conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566, 101 S. Ct. at 1258.

Child welfare actions do not involve consensual business relations and therefore do not fall within the first *Montana* exception. Child welfare actions may affect the welfare of the tribe and thus arguably fall within the second Montana exception. But Strate warned that this second exception should not be interpreted so that "the exception . . . severely shrink[s] the rule." *Strate*, ___ U.S. at ___, 117 S. Ct. at 1415. "Read in isolation, the *Montana* rule's second exception can be misperceived. Key to its

proper application, however, is the Court's preface: 'Indian tribes retain their inherent power [to punish tribal offenders,] to determine tribal membership, to regulate domestic relations *among* members, and to prescribe rules of inheritance for members. . . . But [a tribe's inherent power does not reach] beyond what is necessary to protect tribal self-government or to control internal relations.' " *Id.* at ___, 117 S. Ct. at 1416 (alteration in original) (quoting *Montana*, 450 U.S. at 564, 101 S. Ct. at 1257-58) (emphasis added).

We need not reach this important issue here. Having determined that the state court does have jurisdiction, the remaining issue is one of judicial restraint. Even if such a doctrine applied, we believe it would be unwise to hold that the state court should refrain from exercising certain state court jurisdiction in favor of uncertain tribal court jurisdiction.

Wilson, as Sahira's mother, has a right to bring this action in state court. There is no countervailing tribal interest in helping Zaman, a non-Indian, escape his legal obligations to Wilson, a member of the Navajo Tribe, and Sahira, a child eligible for membership in the Tribe. Tribal court jurisdiction exists for the protection and benefit of tribal members. It would stand federal Indian law on its head to allow a non-Indian to exploit a tribal immunity to the disadvantage of a tribal member and her child. The state court properly exercised subject matter jurisdiction.

III. Conclusion

We vacate the opinion of the court of appeals and remand to the court of appeals for resolution of the issues properly raised on appeal but not decided.

Frederick J. Martone, Justice
CONCURRING:
Thomas A. Zlaket, Chief Justice
Charles E. Jones, Vice Chief Justice
Stanley G. Feldman, Justice
Robert D. Myers, Judge

Justice James Moeller did not participate in the determination of this matter. Judge Robert D. Myers, Presiding Judge, Superior Court of Arizona in Maricopa County, was appointed to sit in his stead pursuant to Ariz. Const. art. VI, §3.

§ 1162. State jurisdiction over offenses committed by or against Indians in the Indian country

(a) Each of the States or territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State.
Minnesota.....	All Indian country within the State, except the Red Lake Reservation.
Nebraska.....	All Indian country within the State.
Oregon	All Indian country within the Sate, except the Warm Springs Reservation.
Wisconsin.....	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in

trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto, or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction. (Added Aug. 15, 1953, ch 505, § 2, 67 Stat. 588; Aug. 24, 1954, ch 910, § 1, 68 Stat. 795; Aug. 8, 1958, P. L. 85-615, § 1, 72 Stat. 545; Nov. 15, 1970, P.L. 91-523, §§ 1, 2, 84 Stat. 1358.)

* * *

JURISDICTION OVER CRIMINAL AND CIVIL ACTIONS

§ 1321. Assumption by State of criminal jurisdiction

(a) Consent of United States; force and effect of criminal laws. The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular

Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, and use of property; hunting, trapping, or fishing. Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(April 11, 1968, P.L. 90-284, Title IV, § 401, 82 Stat. 78.)

§ 1322. Assumption by State of civil jurisdiction

(a) Consent of United States; force and effect of civil laws. The consent of the United States is hereby given to any State nor having jurisdiction over civil causes of action between Indians or to which Indians are parties

which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, use, and probate of property. Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, in ownership or right to possession of such property or any interest therein.

(c) Force and effect of tribal ordinances or customs. Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State,

be given full force and effect in the determination of civil causes of action pursuant to this section. (April 11,1968, P. L. 90-284, Title IV, § 402, 82 Stat. 79.)

§ 1323. Retrocession of jurisdiction by State

(a) Acceptance by United States. The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18 of the United States Code [18USCS § 1162], section 1360 of title 28 of the United States Code [28 USCS § 1360], or section 7 of the Act of August 15, 1952 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Repeal of statutory provisions. Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal. (April 11, 1968, P. L. 90-284, Title IV, § 403, 82 Stat 79.)

§ 1324. Amendment of State constitutions or statutes to remove legal impediment; effective date

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this title [25 USCS §§ 1321 et seq.]. The provisions of this title [25 USCS

§§ 1321 et seq.] shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

(April 11, 1968, P.L. 90-284, Title IV, § 404, 82 Stat. 79.)

§ 1325. Abatement of actions

(a) Pending actions or proceedings; effect of cession. No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this title [25 USCS §§ 1321 et seq.] shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) Criminal actions; effect of cession. No cession made by the United States under this title [25 USCS §§ 1321 et seq.] shall deprive any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purposes of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.

(April 11, 1968, P.L. 90-284, title IV, § 405, 82 Stat. 80.)

§ 1326. Special election

State jurisdiction acquired pursuant to this title [25 USCS §§ 1321 et seq.] with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

(April 11, 1968, P.L. 90-284, Title IV, § 406, 82 Stat. 80.)

* * *

§ 1360. State civil jurisdiction in actions to which Indians are parties

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	Indian country affected
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota.....	All Indian country within the State, except the Red Lake Reservation
Nebraska.....	All Indian Country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin.....	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

(Aug. 15, 1953, ch 505, § 4, 67 Stat. 589; Aug. 24, 1954, ch 910, § 2, 68 Stat. 795; Aug. 8, 1958, P. L. 85-615, § 2, 72 Stat. 545; Nov. 6, 1978, P. L. 95-598, Title II, § 239, 92 Stat. 2668; July 10, 1984, P. L. 98-353, Title I, § 110, 98 Stat. 342.)

Public lands; Indian lands

Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

TREATY WITH THE NAVAHO, 1868.

Articles of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W.T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo Nation or tribe of Indians, represented by their chiefs and head-men, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and head-men being hereto subscribed,) of the other part, witness:

ARTICLE 1. From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If the bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian; subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United

States, to be tried and punished according to its laws; and in case they willfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

ARTICLE 2. The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Cañon Bonito,east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109° 30′ west of Greenwich, provided it embraces the outlet of the Cañon-de-Chilly, which cañon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employés of the Government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed

by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

ARTICLE 3. The United States agrees to cause to be built, at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter-shop and blacksmith-shop, not to cost exceeding one thousand dollars each; and a schoolhouse and chapel, so soon as a sufficient number of children can be induced to attend school, which shall not cost to exceed five thousand dollars.

ARTICLE 4. The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE 5. If any individual belonging to said tribe, or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within

said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land-book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon, that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Navajo land-book."

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each.

The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper.

ARTICLE 6. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

ARTICLE 7. When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.

ARTICLE 8. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency-house on the

reservation herein named, on the first day of September of each year for ten years, the following articles, to wit:

Such articles of clothing, goods, or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian – each Indian being encouraged to manufacture their own clothing, blankets, &c.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appropriated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect

and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE 9. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:

1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.

2d. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

3d. That they will not attack any persons at home or travelling, nor molest or disturb any wagon-trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. That they will never capture or carry off from the settlements women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They will not in future oppose the construction of railroads, wagon-roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or

other works be constructed on the lands of their reservation, the Government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or headman of the tribe.

7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE 10. No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three-fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article [5] of this treaty.

ARTICLE 11. The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

ARTICLE 12. It is further agreed by and between the parties to this agreement that the sum of one hundred

and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any condition provided in the law, to wit:

1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.

2d. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

3d. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.

5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mexico, and when completed, the management of the tribe to revert to the proper agent.

ARTICLE 13. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further

agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W. T. Sherman,
Lieutenant-General,
Indian Peace Commissioner.
S. F. Tappan,
Indian Peace Commissioner.

Barboncito, chief,
his x mark.
Armijo, his x mark.
Delgado.
Manuelito, his x mark.
Largo, his x mark.
Herrero, his x mark.
Chiqueto, his x mark.
Muerto de Hombre,
his x mark.
Hombro, his x mark.
Narbono, his x mark.
Narbono Segundo,
his x mark.
Gañado Mucho, his x mark.
Council:
Riquo, his x mark.
Juan Martin, his x mark.
Serginto, his x mark.
Grande, his x mark.
Inoetenito,
his x mark.
Muchachos Mucho,
his x mark.
Chiqueto Segundo,
his x mark.
Cabello Amarillo,
his x mark.
Francisco, his x mark.
Torivio, his x mark.
Desdendado, his x mark.
Juan, his x mark.
Guero, his x mark.
Gugadore, his x mark.
Cabason, his x mark.
Barbon Segundo,
his x mark.
Cabares Colorados,
his x mark.

Attest:
Geo. W.G. Getty,
colonelThirty-seventh
Infantry, brevet major-
general U.S. army.
B.S. Roberts, brevet
brigadier-general U.S.
Army, lieutenant-colonel
Third Cavalry.
J. Cooper McKee, brevet
lieutenant-colonel, surgeon
U.S. Army.
Theo. H. Dodd, United
States Indian agent for
Navajos.
Chas. McClure, brevet
major and commissary of
subsistence, U.S. Army.
James F. Weeds, brevet
major and assistant
surgeon, U.S. Army.
J.C. Sutherland,
interpreter.
William Vaux, chaplain
U.S. Army.